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ARTICLES

Hamas' October 7th Genocide: Legal Analysis and the Weaponisation of Reverse Accusations – A Study in Modern Genocide Recognition and Denial

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Abstract

This article analyses the October 7th 2023 Hamas attack on Israel through the lens of the Genocide Convention, arguing that these actions constitute genocide under international law. Drawing on international case law, the analysis demonstrates how Hamas' actions meet both the physical element and specific intent requirements for genocide, evidenced by its ideology, systematic policies and leadership statements. The article also examines how reverse accusations of genocide against Israel have functioned as a rhetorical shield to deflect recognition of Hamas' own genocidal actions. It analyses the legal implications for state parties and the international community.

Keywords: Hamas; October 7th; Genocide Convention; International Court of Justice (ICJ); Israel

1. Introduction

The attack on October 7th 2023 by Hamas on Israeli civilians marked one of the deadliest assaults in modern history, resulting in over 1,200 deaths and raising critical questions about the legal classification of these acts under international law. While much attention has been focused on Israel's military response in Gaza, there has been limited scholarly analysis of whether Hamas' actions themselves constituted genocide under the Convention on the Prevention and Punishment of the Crime of Genocide.[1] This article examines the attacks of October 7th through the lens of international law, analysing both the physical acts committed and the evidence of specific intent required to establish genocide. It argues that the systematic targeting of Israeli Jews by Hamas, combined with its documented ideology and statements,

[1] Convention on the Prevention and Punishment of the Crime of Genocide (entered into force 12 January 1951) 78 UNTS 277 (Genocide Convention).

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meets the legal threshold for genocide under international law. The analysis also explores how accusations of genocide against Israel, mainly through South Africa's application to the International Court of Justice (ICJ), have served as a rhetorical shield to deflect attention from Hamas' own genocidal actions. The implications of this determination extend beyond legal classification, affecting issues of accountability, deterrence and the international community's obligations to prevent and punish such acts.

The article examines why correctly classifying the events of October 7th as genocide matters, particularly for deterrence and collective memory. It then establishes the theoretical framework by analysing the responsibility of armed groups under international law and reviewing recent ICJ case law on genocide. The article proceeds to examine the elements of genocide under international law before presenting a detailed analysis of Hamas' attack on October 7th, demonstrating how the acts committed constitute the physical element (*actus reus*) of genocide. It then marshals extensive evidence of Hamas' genocidal intent, including its foundational ideology, systematic policies, documented preparations and statements by its leaders before and during the attack. The analysis then turns to examine how accusations of genocide against Israel, particularly the South African application to the ICJ, have been deployed as a rhetorical shield to deflect recognition of Hamas' own genocide. Finally, the article considers the legal consequences of the violation of the Genocide Convention by Hamas, including obligations for state parties and the international community to prevent and punish these acts.

2. The significance of genocide recognition: Deterrence, memory and justice

In addition to the legal duties that the Genocide Convention imposes on state parties, the proper labelling of the events of October 7th 2023 as 'genocide' is crucial for reasons of deterrence, combating denial, recovery, and the shaping of social memory.

On 22 August 1939, following the German invasion of Poland, Adolf Hitler informed his generals of his plans to settle Poland *en masse* with Germans. His plans for German 'living space' would require the mass murder of Poles and Jews. Hitler dismissed any international opposition or harm that the mass killings might do to Germany, reportedly telling his generals: 'Who after all is today speaking about the destruction of the Armenians [during the First World War]?'[2] This anecdote emphasises that failure to recognise and punish the perpetrators of genocide emboldens future genocidaires.

The historian of antisemitism, Robert Wistrich, has identified 'eliminationist' or genocidal antisemitism as the shared core of the totalitarian ideologies of Nazism, Communism and Islamism. As he describes the ideology that motivates Hamas and other Islamic groups:[3]

[2] 'Contents of the Speech by the Fuhrer to the Chief Commanders and Commanding Generals on the Obersalzberg, August 22 1939', in EL Woodward and Rohan Butler (eds), *Documents on British Foreign Policy, 1919–1939* (3rd series, Vol 7, Foreign Office 1995) 258.

[3] Robert S Wistrich, *A Lethal Obsession: Anti-Semitism from Antiquity to the Global Jihad* (Random House 2010) 6.

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> Much of this antisemitic worldview has infected the body politic of Islam during the past forty years. Its focus has become the 'collective Jews' embodied in the State of Israel. Its geographic center of gravity has moved to the Middle East, but the tone and content of the rhetoric, along with the manifest will to exterminate the Jews, are virtually identical to German Nazism. The leadership of Iran does not even disguise its desire for a *juden-frei* (Jew-free) Middle East – a 'world without Zionism,' to adopt a more politically correct language. Radical Islamists of every stripe openly proclaim at every opportunity that the eradication of Israel is a divine commandment, the will of God, and a necessary prologue to the liberation of mankind. In a manner reminiscent of the Nazis, they see themselves as engaged in a war of civilizations against terminal Western decadence (analogous to *jahiliya*, or pre-Islamic barbarism), equated with social chaos, sexual permissiveness, idolatry, and apostasy. All these evils are symbolized by perfidious 'Jewish influence.' As in Nazi antisemitism ... Islamofascism today builds on the same mythological figure of the satanic, ubiquitous, immoral, and all-powerful Jew that once haunted the European antisemitic imagination from Richard Wagner to Adolf Hitler.

This eliminationist antisemitism is the defining feature of the Hamas ideology. It is shared by a wide range of Islamist groups, such as the Muslim Brotherhood, al-Qaeda, the Islamic State (ISIS) and Khomeinist Iran.[4] The aftermath of the genocide of October 7th has seen the worst wave of anti-Semitic violence against Diaspora Jewish communities since the end of the Second World War.[5] Islamic groups such as al-Qaeda and ISIS have called on their followers worldwide to follow the Hamas example and attack Jews.[6]

The use of the label 'genocide' may prompt a systematic examination of Islamist ideology and the threat that it poses to Jews, among others. It would also undermine certain defensive arguments made in favour of Hamas – namely, that it is acting in self-defence against Israeli aggression and is a legitimate response to occupation. Hamas, although a Palestinian nationalist movement, has its origins in the virulently anti-Zionist and antisemitic Muslim Brotherhood movement founded in Egypt in the 1920s. The Muslim Brotherhood was violently opposed to any form of Jewish statehood in Israel far before 1948 or the post-1967 Israeli administration of Gaza, Judea and Samaria.[7] Furthermore, Hamas was emboldened by the Israeli withdrawal from Gaza in 2005 and stepped up its violent attacks on Israel.[8] That is because Hamas'

[4] Markos Zografos, 'Genocidal Antisemitism: A Core Ideology of the Muslim Brotherhood', *ISGAP Occasional Paper Series*, No 4, June 2021, https://isgap.org/wp-content/uploads/2021/06/GenocidalAntisemitism-Markos-Zografos.pdf.

[5] Rosa Freedman and David Hirsh (eds), *Responses to 7 October: Antisemitic Discourse* (Taylor and Francis 2024); Cary Nelson, 'October 7 and the Antisemitic War of Words' in Rosa Freedman and David Hirsh (eds), *Responses to 7 October: Universities* (Routledge 2024) 88–94.

[6] Anti-Defamation League, 'Islamic State, Al-Qaeda Call for Violence Against Jewish Communities Following October 7 Attack', 1 December 2023, https://www.adl.org/resources/article/islamic-state-al-qaeda-call-violence-against-jewish-communities-following-october.

[7] Zografos (n 4).

[8] Michael Herzog, 'A Wind in Hamas's Sails: Palestinian Militants Gather Post-Disengagement Momentum', The Washington Institute for Near East Policy, 13 Sept. 2005,

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goal is not a Palestinian state within the 1967 lines alongside Israel but an Islamic state in place of Israel.

The State of Israel and its Jewish population remain under genocidal threat, mainly from Iran and its proxies, which include Hamas, Hezbollah and the Houthis. Less than one month after the attacks of October 7th , Hamas official Ghazi Hamad told a Lebanese news outlet that 'Israel is a country that has no place on our land ... We must remove that country ... The Al-Aqsa Flood [the October 7th massacre] is just the first time, and there will be a second, a third, a fourth'.[9] Iranian Supreme Leader Ali Khamenei reaffirmed Iran's commitment to Israel's destruction in a meeting on 23 May 2024 with Hamas leader, Ismail Haniyeh, in Tehran. At this meeting Khamenei said, 'The divine promise to eliminate the Zionist entity will be fulfilled, and we will see the day when Palestine will rise from the river to the sea', to which Haniyeh responded, 'God willing, we will see that day together'.[10]

The October 7th genocide has been met with persistent denial, especially among Muslim communities and the far right. According to one poll, only 25 per cent of UK Muslims believe that Hamas terrorists committed rape and murder in that attack. Additionally, 46 per cent of British Muslims expressed support for Hamas, and 39 per cent denied that atrocities were committed on October 7th .[11] Conspiracy theorists have spread claims that Israel was responsible for the killing of its own citizens. Especially pernicious is the denial of mass rape and sexual violence committed by Palestinian armed groups against Israeli women. For example, during the United Nations (UN) Human Rights Council's 56th session, the Palestinian representative insisted that the UN Commission of Inquiry found no evidence of rape.[12]

Recognition of the events of October 7th as genocide may have a deterrent effect, both in signalling Israel's resolve to prevent its repetition and by prompting the international community to act against Iran and its genocidal proxies. In 1998, Rwandan officials argued that the prosecution of Hutu genocidaires in the Rwandan courts would serve as a deterrent against Hutu guerillas who were still targeting Tutsis at the time. Similarly, Pol Pot and Ieng Sary were tried *in absentia* while they still controlled Cambodian territory. The Cambodian government sought to deter

https://www.washingtoninstitute.org/policy-analysis/wind-hamass-sails-palestinian-militants-gather-post-disengagement-momentum.

[9] Jerusalem Post Staff, '"We Will Repeat October 7 Again and Again" – Hamas Official', *The Jerusalem Post*, 1 November 2023, https://www.jpost.com/arab-israeli-conflict/article-771199.

[10] 'Iran's Khamenei Tells Visiting Hamas Chief that Israel "Will One Day Be Eliminated"', *The Times of Israel*, 23 May 2024, https://www.timesofisrael.com/irans-khamenei-tells-visiting-hamas-chief-that-israel-will-one-day-be-eliminated.

[11] 'Only One in Four British Muslims Believe Hamas Committed Murder and Rape in Israel on October 7th', Henry Jackson Society, 8 April 2024, https://henryjacksonsociety.org/2024/04/08/only-one-in-four-british-muslims-believe-hamas-committed-murder-and-rape-in-israel-on-october-7th.

[12] Jerusalem Institute of Justice, 'Echoes of Denial – Oct. 7th Atrocities & Rising Antisemitism', 22 July 2024, 6, https://jij.org/advocacy-materials/echoes-denial-october-7th-atrocities-rising-antisemitism-report; Elizabeth Dwoskin, 'Denial of the Oct. 7 Hamas Attack on Israel Is Spreading', *The Washington Post*, 21 January 2024, https://www.washingtonpost.com/technology/2024/01/21/hamas-attack-october-7-conspiracy-israel; Anti-Defamation League, 'Denial and Distortion of the Hamas-led October 7 Attack: An Overview of False Narratives', 28 June 2024, https://www.adl.org/resources/article/denial-and-distortion-hamas-led-october-7-attack-overview-false-narratives.

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future crimes.[13] Therefore, legal recognition of the October 7th atrocities as genocide by both international and Israeli authorities will allow the exposure of the extent of Hamas' crimes and the network of perpetrators and their supporters.

Recognition of the genocidal nature of the Hamas attacks alongside a public trial may also serve as a catharsis for Israeli society. As Caroline Fournet explains:[14]

> The impact of legal recognition, and thus of the legal memory, of the crime of genocide on shaping collective memory and remembrance of the crimes lies precisely in the recognition of the victims. And indeed, by legally qualifying the crime of genocide as genocide, trials would simultaneously acknowledge the status of victims as victims ... Because genocide is precisely nothing but the denial of the victims' identity, dignity and humanity, victims of genocide want justice not only to see the perpetrators punished but also to be recognized as victims through the official public recognition of the perpetration of the crime. In the course of such trials, and therefore of the recognition of victims as victims, it is also argued here that it is essential for those victims who wish to do so to be able to testify; whether for individual purposes – testifying might somehow help them to exorcize their pain and to heal their wounds – or for collective reasons – they might feel that their testimonies will ultimately reinforce, if not ensure, the collective memory of the crime.

Historical precedents, such as Hitler's dismissal of the repercussions of the Armenian genocide, underscore the importance of recognising and punishing genocide to prevent future atrocities. Israel faces ongoing genocidal threats from Iran and its proxies, including Hamas. Recognising October 7th as genocide may deter further violence, prompt international action, and provide societal catharsis by acknowledging victims' suffering. Legal recognition can also expose the extent of Hamas' crimes and support a robust collective memory.

While the destruction of Israel is an integral part of Hamas ideology, recently captured documents demonstrate that on October 7th Hamas believed that Israel's destruction was a goal that they could achieve. According to documents seized by the Israel Defence Forces (IDF) in the Gaza Strip, following the 2021 Guardian of the Walls Operation, the Hamas leadership began to consider Israel's elimination as being highly feasible in the near future. On October 7th, Hamas intended to provoke a multi-front war against Israel, including Israeli Arabs and other Iranian 'axis of resistance' groups, which would result in Israel's collapse.[15] Therefore, distinct from other acts of terrorism carried out by Hamas, the attack of October 7th was perpetrated with the real and immediate intention of Israel's destruction and the genocide of its Jewish population.

[13] John Quigley, *The Genocide Convention: An International Law Analysis* (Ashgate 2006) 282.

[14] Caroline Fournet, *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Ashgate 2007) 132–33.

[15] Uri Rosset, 'Hamas' Strategy to Destroy Israel: From Theory into Practice, as Seen in Captured Documents', Meir Amit Intelligence and Terrorism Information Center, 13 March 2025, https://www.terrorism-info.org.il/en/hamas-strategy-to-destroy-israel-from-theory-into-practice-as-seen-in-captured-documents.

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3. Legal framework: Non-state actors and international criminal responsibility

A preliminary issue that must be examined is whether Hamas, as a non-state entity and an armed group (the two terms are used interchangeably), can be held collectively responsible for the crime of genocide. Scholars have pointed out that armed groups now play an outsized role in armed conflicts worldwide. According to Annyssa Bellal's *The War Report 2018*, 51 of the 59 active armed conflicts involved armed groups.[16] The UN Secretary-General has noted the preponderance of human rights abuses committed by armed groups:[17]

> The consequences for civilians have been devastating, as armed groups have often sought to overcome their military inferiority by employing strategies that flagrantly violate international law. These range from deliberate attacks against civilians, including sexual violence, to attacks on civilian objects such as schools, to abduction, forced recruitment and using civilians to shield military objectives.

While it is widely accepted that armed groups have international obligations under international humanitarian law,[18] the degree to which they bear collective responsibility as a group is unclear. The International Committee of the Red Cross (ICRC) study on customary international humanitarian law (IHL) has admitted that armed groups 'incur responsibility for acts committed by persons forming part of such groups'.[19] However, the content of such responsibility is unclear. In its 2016 Commentary to Common Article 3, the ICRC stated that it is still undetermined whether international law can attribute collective responsibility to non-state actors for the acts committed by their members.[20] Alternately, the Articles on State Responsibility offer the possibility 'that the insurrectional movement may itself be held responsible for its conduct under international law, for example for a breach of international humanitarian law committed by its forces'.[21]

[16] Annyssa Bellal, *The War Report: Armed Conflicts in 2018* (Geneva Academy of International Humanitarian Law and Human Rights 2019) 32–34, https://www.geneva-academy.ch/joomlatools-files/docman-files/The%20War%20Report%202018.pdf.

[17] UN Secretary-General, Report of the Secretary-General on the Protection of Civilians in Armed Conflict (10 November 2010), UN Doc S/2010/579, para 8.

[18] Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369; Jann K Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 93(882) *International Review of the Red Cross* 443; Cedric Ryngaert, 'Non-State Actors in International Humanitarian Law' in Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011) 284.

[19] Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law, Vol I: Rules* (International Committee of the Red Cross and Cambridge University Press 2005, revised 2009) 536 (ICRC Study).

[20] ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, ICRC and Cambridge University Press 2016), https://ihl-databases.icrc.org/ihl/full/GCI-commentary (Commentary GC I (2016)), Commentary on Article 3, para 892.

[21] Draft Articles on Responsibility of States for Internationally Wrongful Act (2001), UN Doc No A/56/10, Commentary on Article 10, para 16.

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The current international legal framework has several responses to violations of international humanitarian law by non-state actors: international criminal law, truth-seeking mechanisms, naming and shaming, and sanctions.[22] Although international criminal law focuses on the responsibility of individual perpetrators, it recognises that certain international crimes require group action. These existing mechanisms may form the basis for a more expansive notion of armed group responsibility.

According to the International Criminal Tribunal for the Former Yugoslavia (ICTY):[23]

> Most of the time these [international] crimes do not result from the criminal propensity of single individuals but constitute manifestations of collective criminality: the crimes are often carried out by groups of individuals acting in pursuance of a common criminal design. Although only some members of the group may physically perpetrate the criminal act..., the participation and contribution of the other members of the group is often vital in facilitating the commission of the offence in question.

According to Article 7(2)(a) of the Rome Statute of the International Criminal Court, a key element of crimes against humanity is the existence 'of a State or an organizational policy to commit such attack'. In *Prosecutor v Tadić*, the ICTY recognised that armed groups exercising de facto control over territory may perpetrate crimes against humanity.[24] In the *Tadić* Appeals Chamber judgment, the Court established the doctrine of joint criminal enterprise (JCE), which holds that each member of an organised group can be individually responsible for crimes committed as part of a common plan or purpose, even if they did not physically participate in the crime(s).[25] The JCE doctrine has been incorporated in Article 25(3)(d) of the Rome Statute.

The United Nations has set up many investigative mechanisms to monitor international humanitarian law violations of armed groups.[26] A small number have explicitly examined the collective responsibility of armed groups, including their obligation to provide reparations to victims. Referring to violations committed by the Sudan Liberation Movement and the Justice and Equality Movement, the Commission of Inquiry in Darfur stated:[27]

> Serious violations of human rights law and humanitarian law may amount to international crimes, subject to the conditions set out by the ICTY in *Tadić (Interlocutory Appeal)* and largely codified in the ICC Statute. In other words, these violations may entail the individual criminal liability of their author

[22] Laura Íñigo Álvarez, *Towards a Regime of Responsibility of Armed Groups in International Law* (Intersentia 2019) 35–52.

[23] ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-A, Appeals Chamber, 15 July 1999, para 191.

[24] ICTY, *Prosecutor v Tadić*, Judgment, IT-94-1-T, Trial Chamber, 7 May 1997, para 654.

[25] *Tadić* (n 23) paras 185–229.

[26] Íñigo Álvarez (n 22) 39.

[27] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005), para 175.

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> or authors. These violations may also involve the international responsibility of the State or of the international non-state entity to which those authors belong as officials (or for which they acted as de facto organs), with the consequence that the State or the non-state entity may have to pay compensation to the victims of those violations.

Similarly, the Panel of Experts on Accountability in Sri Lanka recognised that the Liberation Tigers of Tamil Eelam (LTTE) could be held responsible for international humanitarian law violations:[28]

> The Panel considers three forms of responsibility. State responsibility concerns whether the State of Sri Lanka would be responsible for violations were the alleged facts found to be true. Under international law, state responsibility applies only to the acts of the State of Sri Lanka. Actions by non-state actors, such as paramilitary groups or private citizens who act under the instructions of, or are directed or controlled by, the State are imputable to the State. Organizational responsibility is a concept that recognizes that international humanitarian law also places duties on non-state armed groups, including, in this case the LTTE. Individual responsibility generally concerns whether particular individuals regardless of their affiliation in an armed conflict would be criminally responsible for violations. Criminal responsibility attaches to certain acts, regardless of whether the individual was acting on behalf of the Government or the LTTE (or neither).

The UN Secretary-General has appointed a Special Representative to examine the abuse of children and sexual violence in armed conflicts. The Special Representative submits annual reports to the General Assembly and the Human Rights Council. In the 2023 report to the General Assembly, the Secretary-General notes that armed groups perpetrated close to 50 per cent of grave violations.[29] Such 'naming and shaming' is another mechanism used to address human rights violations by armed groups.

Finally, Chapter VII of the UN Charter allows the Security Council to impose sanctions against armed groups and states.[30] The Security Council has imposed sanctions on Bosnian Serb militias in the former Yugoslavia, armed groups in Sierra Leone, the Taliban in Afghanistan and other groups in the Democratic Republic of Congo, among others.[31] Sanctions, among other mechanisms, demonstrate that

[28] Report of the Secretary General's Panel of Experts on Accountability in Sri Lanka (31 March 2011) para 191.

[29] Promotion and Protection of the Rights of Children: Children and Armed Conflict, Report of the Secretary-General (3 June 2024) UN Doc A/78/842-S/2024/384, para 10.

[30] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI.

[31] UNSC Res 942 (23 September 1994), UN Doc S/RES/942; UNSC Res 1132 (8 October 1997), UN Doc S/RES/1132; UNSC Res 1171 (5 June 1998), UN Doc S/RES/1171; UNSC Res 1267 (15 October 1999), UN Doc S/RES/1267; UNSC Res 1493 (28 July 2003), UN Doc S/RES/1493; UNSC Res 1807 (31 March 2008), UN Doc S/RES/1807. See also Jann K Kleffner, 'The Collective Accountability of Organised Armed Groups' in André Nollkaemper and Harmen van der Wilt, *System Criminality and International Law* (Cambridge University Press 2009) 238, 253.

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the international system recognises the need for action against armed groups, in addition to the individual criminal responsibility of its members.

Laura Íñigo Álvarez suggests a comparison of the common principles of attribution rules for states codified in the Articles of State Responsibility (ASR) and the rules of attribution for international organisations codified in the Articles of Responsibility of International Organizations (ARIO), and applying these to armed groups.[32] These common principles are: (a) attribution based on the conduct of organs and agents belonging to the organisation, including ultra vires acts; (b) attribution based on the conduct of other individuals or entities under the direction and control of the organisation; and (c) attribution based on acknowledgement of the conduct of the organisation as its own.[33] These principles are particularly appropriate to apply to groups like Hamas, which since 2007 has served as the de facto governing authority in Gaza. The governing apparatus of Hamas was highly centralised, and included a parliament, numerous ministries and a large bureaucracy.[34]

It should be noted that while this article focuses specifically on Hamas, a similar analysis can be made regarding crimes committed by members of the Palestinian Islamic Jihad. Gazan civilians who participated in the October 7th atrocities could potentially be charged with complicity in genocide or aiding and abetting genocide.[35]

As non-state actors increasingly play a central role in armed conflicts and often display the characteristics of states, the current non-attribution of group responsibility is inadequate. In recent years, German courts have set a precedent in convicting members of the Islamic State in Iraq and Syria (ISIS) of genocide and related crimes against the Yazidi minority.[36] Multiple international entities, such as the UN and the US State Department, have recognised the ISIS campaign against the Yazidis as genocide.[37] However, the restrictive attribution of responsibility limits

[32] Íñigo Álvarez (n 22) Ch IV.

[33] ibid 133.

[34] See Devorah Margolin, 'Retreating from Legitimacy: Hamas's Engagement in and Disengagement from Governance', The Washington Institute for Near East Policy, *Jihadist Governance and Statecraft Series*, 6 August 2024.

[35] ICTY, *Prosecutor v Blagojević*, Judgment, IT-02-60-A, 9 May 2007, para 122; ICTR, *Prosecutor v Ntakirutimana*, Judgment, ICTR-96-10-A and ICTR-96-17-A, 13 December 2004, para 364.

[36] See Higher Regional Court of Frankfurt (Germany), *Genocide to the Detriment of the Yazidi Religious Group*, Case No. 5-3 StE 1/20.4.1/20, 30 November 2021, ECLI:DE:OLGHE:2021:1130.5.3STE1.20.4.1.20.00, unofficial English translation available: https://www.eurojust.europa.eu/sites/default/files/assets/taha-aj-higher-regional-court-of-justice-5-3-ste-120.pdf; BGH (German Federal Court of Justice), Case No 3 StR 230/22, 17 January 2023; Higher Regional Court of Düsseldorf (Germany), Judgment of 21 April 2021, Case No 7 StS 2/20, https://nrwe.justiz.nrw.de/olgs/duesseldorf/j2021/7_StS_2_20_Urteil_20210421.html; Higher Regional Court of Koblenz (Germany), Case No 1 StE 3/21, 24 February 2021, https://www.eurojust.europa.eu/sites/default/files/assets/files/13-de-1-ste-321-higher-regional-court-of-koblenz-24-february-2021.pdf.

[37] UN Security Council, Fourth Report of the Special Adviser and Head of the United Nations Investigative Team to Promote Accountability for Crimes Committed by Da'esh/ISIL in Iraq and the Levant (UNITAD) (11 May 2020), UN Doc S/2020/386; UN Human Rights Council, ' "They Came to Destroy": ISIS Crimes Against the Yazidis' (15 June 2016), UN Doc A/HRC/32/CRP.2; US Department of State, '2023 Country Reports on Human Rights Practices: Iraq', 22 April 2024, https://www.state.gov/reports/2023-country-reports-on-human-rights-practices/iraq; supplemented by statements from the United States Commission on International Religious Freedom, *USCIRF Annual Report*, May 2024, 58.

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victims' access to justice. An organisational conviction could implicate the entire chain of command and support structure without targeting each person individually. It might allow for reparations or asset seizure to be redirected to victims. Therefore, attribution of group responsibility to Hamas may lead the way in redefining how armed groups are treated under international law as well as promote broader recognition and justice for victims.

4. Evolution of genocide jurisprudence: Key ICJ precedents

The evolving jurisprudence of the International Court of Justice on genocide provides essential interpretive guidance for analysing Hamas' actions. Three aspects are particularly relevant. First, the Court's decisions in *Bosnia and Herzegovina v Serbia* and *Croatia v Serbia* establish the framework for proving genocidal intent through patterns of conduct and circumstantial evidence. Second, the *Ukraine v Russia* case demonstrates how accusations of genocide can be weaponised for political purposes, a dynamic relevant to understanding the broader context of the events of October 7th. Third, the *Gambia v Myanmar* decision expands our understanding of state obligations to prevent and punish genocide, which has direct implications for states currently providing safe haven for Hamas leaders. This jurisprudential framework helps us to evaluate both the substantive elements of Hamas' actions and the international community's legal obligations in response.

The ICJ decision, issued on 26 February 2007, on the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* was the first to hear a case brought by one state against another for allegations of genocide. The Court held that the Genocide Convention imposes a duty on state parties not to commit genocide and other related acts, such as conspiracy to commit genocide, direct and public incitement to genocide, attempt to commit genocide, and complicity in genocide.[38] The Court also held that the targeted group's legal definition was positive. Therefore, the ICJ examined whether genocide was committed against Bosnian Muslims, as opposed to 'non-Serbs'. The Court also concluded that genocide against 'part' of the group must target a part that is substantial enough to have an impact on the entire group.[39] In terms of proof, the ICJ held that 'charges of exceptional gravity must be provided by evidence that is fully conclusive'.[40] In this regard, the ICJ relied on the fact-finding procedures of the ICTY and other UN reports and resolutions. In keeping with the ICTY findings, the ICJ held that genocide occurred in Srebrenica only in July 1995.

As regards state responsibility, the Court found that the Applicant could not prove that orders to commit genocide were issued by the Former Republic of Yugoslavia (FRY) or that the army of the Republika Srpska, the entity that committed the genocide, was under FRY effective control.[41] However, the Court found that Serbia failed to prevent the genocide at Srebrenica by not taking all measures within its power to stop the massacre, despite being aware of the grave risk of genocide. Serbia

[38] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Rep 43, [142]–[179].

[39] ibid [198]–[201].

[40] Ibid [209].

[41] Ibid [396]–[412].

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influenced the Bosnian Serb forces responsible for the massacre and failed to act to prevent the killings, which constituted a breach of its obligation under the Genocide Convention to prevent genocide. Following the genocide, Serbia did not cooperate fully with the ICTY, specifically in failing to arrest and extradite suspects or to provide evidence requested by the Tribunal.[42]

In 2015, the ICJ issued its judgment in the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, which was broadly consistent with its findings in the Bosnia and Herzegovina case and the ICTY findings. The Court found that Croatia demonstrated the commitment of the *actus reus* of genocide (denial of medical care, food and water; deportation; killings) against Croats without proving the necessary intent to commit genocide. The Court reaffirmed the ICTY's finding that for a pattern of conduct to be accepted as evidence of genocidal intent, it would have to be 'the only reasonable [one] available on the evidence'.[43] As such, patterns of *actus reus* of genocide were committed not to destroy Croats but rather to induce them to leave or to punish the Croat population. Similarly, the Court rejected Serbia's counterclaims of Croatian genocide against Serbs, ruling once again that Serbia failed to prove the *dolus specialis* (special intent) required of genocide.[44]

On 27 February 2022, Ukraine introduced proceedings against Russia before the ICJ, asking the Court to issue provisional measures, inter alia, ordering Russia to end its military operations in Ukraine. Prior to and during its invasion, Russia accused Ukraine of committing genocide against Russian co-ethnics in the Donbas region of Ukraine.[45] Ukraine requested the Court to rule that, contrary to Russian claims, no genocide had occurred in Ukraine and that the Genocide Convention did not authorise Russia to take military action to prevent such a genocide.[46] The uniqueness of the proceedings lies in it being a reverse genocide accusation, in which Ukraine sought the jurisdiction of the ICJ based on the Charter to counter Russian claims of Ukrainian genocide. The Court, having established its prima facie jurisdiction over the dispute, held that it had not been presented with evidence substantiating Russian allegations of genocide in Ukraine and that it was 'doubtful' whether the Convention authorised the unilateral use of force on the territory of another state to prevent or punish alleged genocide.[47] The Court ordered an immediate halt to Russian military actions based on the urgency of the matter and the risk of irreparable harm to the civilian population in Ukraine before the Court's final decision.[48]

[42] Antoine Ollivier, 'The Judgment of the International Court of Justice in the "Genocide" Case between Bosnia and Herzegovina v Serbia and Montenegro' (2007) 46 *International Legal Materials* 185.

[43] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment [2015] ICJ Rep 3, [148]; reaffirming ICTY, *Prosecutor v Tolimir*, Judgment, IT-05-88/2-T, Trial Chamber, 12 December 2007, para 745.

[44] Hemi Mistry, 'The International Court of Justice's Judgment in the Final Balkans *Genocide Convention* Case' (2016) 16(2) *Human Rights Law Review* 357.

[45] Andreas Kulick, 'Provisional Measures after *Ukraine v Russia* (2022)' (2022) 13 *Journal of International Dispute Settlement* 329.

[46] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Provisional Measures, Order [2022] ICJ Rep 212, [2(a)]–[2(b)].

[47] ibid [60].

[48] ibid [74]–[75], [77].

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In July 2022, the ICJ delivered its judgment on preliminary objections in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*. This decision has important ramifications, expanding the notion of state standing before the ICJ in cases involving the Genocide Convention. In November 2019, the Republic of The Gambia (The Gambia) filed proceedings against Myanmar alleging violations of the Genocide Convention with regard to the Rohingya minority. The ICJ rejected Myanmar's claim that The Gambia had brought the proceedings on behalf of the Organization of Islamic States, a non-state actor, without standing before the Court. According to the Court, The Gambia seized the Court in its name, and there was no legal reason to look beyond that.[49] The Court also rejected Myanmar's argument that there was no dispute between the parties, thereby denying ICJ jurisdiction. According to the Court, a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. Four statements made by Gambian representations before the United Nations General Assembly, decrying Myanmar's actions, and a *note verbale* sent to the Permanent Mission of Myanmar to the United Nations were sufficient to establish the existence of a dispute.[50] Most importantly, the Court rejected Myanmar's claim that The Gambia was not an 'injured state' and had suffered no wrong by Myanmar's supposed violations of the Convention. By committing to the obligations within the Convention, all state parties to the Genocide Convention share a common interest in preventing, suppressing and punishing genocide. This shared interest means that each party has obligations towards all other parties, known as *erga omnes partes* obligations, implying that each state party has a vested interest in ensuring compliance with these obligations in every instance. Therefore, every state party is entitled to invoke the responsibility of another party for alleged breaches by seizing the Court.[51]

Canada, Denmark, France, Germany, the Netherlands and the UK submitted a joint declaration of intervention in *The Gambia v Myanmar*, arguing for a broad interpretation of the Genocide Convention.[52] The declaration represents *opinion juris*, without accompanying evidence of state practice. Therefore, the declaration has important, although not binding, interpretative value. Among the significant points made in the declaration, the states argue that genocide is not limited to mass killing and that there is no hierarchy among the acts of genocide. Mass killing and other acts of genocide can be perpetrated in a coordinated manner to destroy a protected group.[53] As for specific intent, this can be established based on circumstantial evidence, namely, widespread patterns of conduct.[54] The Court's finding of genocidal intent as 'the only reasonable inference' refers only to alternative explanations reasonably supported by the evidence.[55] The number of victims killed is not determinative of genocidal

[49] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Preliminary Objections, Judgment [2022] ICJ Rep 478, [34]–[50].

[50] ibid [51]–[77].

[51] ibid [93]–[114].

[52] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*, Intervention, Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland [2023] ICJ Rep 1.

[53] ibid [25].

[54] ibid [49].

[55] ibid [52].

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intent. However, sexual and gender-based violence may play an important role since it has no military value besides harm to the group.[56] The positions expressed in this declaration have yet to crystalise into state practice, although they may point to future developments.

With this jurisprudential framework established, we can now examine the specific elements of genocide that must be proved, and apply them to the Hamas actions on October 7th.

5. Defining genocide: Legal elements and evidentiary requirements

The crime of genocide is one of the most fundamental and severe in international law. Since at least the end of the Second World War, genocide has been considered 'the crime of crimes'. The Genocide Convention codified the crime of genocide for the first time. It was the first human rights treaty adopted in the UN General Assembly and represents the international community's determination to prevent the recurrence of the atrocities committed during the Second World War. The Convention has been ratified by 150 states.

The crime of genocide consists of two parts: an act of genocide accompanied by genocidal intent. The Genocide Convention defines genocide as the following (Article II):

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Genocide is unique among war crimes and crimes against humanity as it requires a *dolus specialis* (a specific or a special intent), which requires that the crime be committed with the intent to destroy in whole or in part, a national, ethnic, racial or religious group as such.[57] This *dolus specialis* is met by demonstrating that genocide was 'the only reasonable inference which can be drawn from the said pattern of conduct'.[58] The specific intent to destroy the group is the distinguishing feature of the crime of genocide. According to the ICTY in the *Jelisic* case, 'it is in fact the *mens rea* which gives genocide its specialty and distinguishes it from an ordinary crime and other crimes against international humanitarian law'.[59] Similarly, the International Criminal Tribunal for Rwanda (ICTR) in the *Akayesu* case defined the *dolus specialis*

[56] ibid [56]–[66].

[57] ICTR, *Prosecutor v Kambanda*, Judgment and Sentence, ICTR 97-23-S, Trial Judgment, 4 September 1998, para 16.

[58] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment [2015] ICJ Rep 9, [407].

[59] ICTY, *Prosecutor v Jelisic*, Judgment, IT-95-10-T, Trial Chamber, 14 December 1999, para 66.

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as 'the specific intention, required as a constitutive element of the crime, which demands that the perpetrator clearly seeks to produce the act charged'.[60]

The ICTR and ICTY jurisprudence are in agreement that the perpetrator of genocide must act with the goal or purpose of destroying the group, as opposed to merely knowing that the campaign is aimed at group destruction.[61] Where the accused do not reveal their mental state, the desire to destroy may be inferred from facts on the ground. As the Court says in *Prosecutor v Akayesu*:[62]

> The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against the same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding members of other groups, can enable the Chamber to infer intent of a particular act.

The destruction of the group refers to its physical destruction, as opposed to its dissolution as a social concept. After considering recent developments in domestic law, the ICTY Trial Chamber in *Prosecutor v Krstić* held:[63]

> It therefore recognizes that, despite recent developments, customary international law limits the definition of genocide to those acts seeking the physical and biological destruction of all or part of the group.

The *Krstić* Appeal Chamber judgment clarifies the meaning of 'part of the group' as referring to a substantial part of that group. The determination of 'substantiality' begins but is not limited to the size of the targeted group. It must also consider the targeted group's overall size and the prominence of the part within the group – whether the specific part is emblematic of the overall group or essential to its survival.[64] However, the Court noted:[65]

> The historical examples of genocide also suggest that the area of the perpetrators' activity and control, as well as the possible extent of their reach, should be considered. Nazi Germany may have intended only to eliminate Jews within Europe alone; that ambition probably did not extend, even at the height of its power, to an undertaking of that enterprise on a global scale. Similarly, the perpetrators of genocide in Rwanda did not seriously contemplate the

[60] ICTR, *Prosecutor v Akayesu*, Judgment, ICTR-96-4-T, Trial Chamber, 2 September 1998, para 498.

[61] ibid; ICTR, *Prosecutor v Rutaganda*, Judgment, ICTR-96-3-A, Appeals Chamber, 26 May 2003, para 524; ICTY, *Prosecutor v Krstić*, Judgment, IT-98-33-A, Appeals Chamber, 19 April 2004, para 134.

[62] *Akayesu* (n 60) para 523; ICTR, *Gacumbitsi v Prosecutor*, Judgment, ICTR-2001-64-A, 7 July 2006, para 40.

[63] ICTY, *Prosecutor v Krstić*, Judgment, IT-98-33-T, Trial Chamber, 2 August 2001, para 580.

[64] ICTY, *Prosecutor v Krstić*, Appeals Chamber (n 61) paras 6–23.

[65] ibid para 13.

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> elimination of the Tutsi population beyond the country's borders. The intent to destroy formed by a perpetrator of genocide will always be limited by the opportunity presented to him. While this factor alone will not indicate whether the targeted group is substantial, it can – in combination with other factors – inform the analysis.

The ICTY in the *Tadić* Appeals Chamber judgment developed the joint criminal enterprise (JCE) doctrine to consider the individual criminal responsibility of perpetrators of a common plan. The Appeals Chamber defined the *actus reus* as follows: (i) a plurality of persons; (ii) a common plan or purpose to commit a crime; and (iii) the participation of the accused in the common design involving the perpetration of a crime. As to the *mens rea*, the Court distinguished between three categories of JCE. According to the first category, all co-perpetrators share a common intent to perpetrate a certain crime (JCE I). The second category requires a personal knowledge of the system of ill-treatment, as well as the intent to further this system (JCE II). The third category consists of the intent to participate in and advance the criminal purpose, along with the foreseeability that a crime might be perpetrated by one or other group members and that the accused willingly took that risk (JCE III).[66]

In the *Tadić* case, the Appeals Chamber applied JCE to hold a perpetrator at the bottom of the command hierarchy responsible for the killing of five men. Dusko Tadić took part in the violent attack on a non-Serbian village, although his direct role in the killing of the men was unclear. According to the Appeals Chamber, Tadić had the intention of advancing the criminal purpose of ethnically cleansing the region of its non-Serbian population by committing inhumane acts against them. Tadić willingly took the risk that co-perpetrators might foreseeably kill non-Serbs in pursuit of this common plan.[67] The ICTY has applied JCE to other low-ranking perpetrators,[68] commanders or wardens of prison camps,[69] mid-level perpetrators[70] and the highest echelon of power.[71]

To refine the application of the JCE doctrine to Hamas' actions on October 7th 2023, it is critical to identify the specific *mens rea* category that aligns with the group's collective criminality. The most applicable framework is JCE I, where all co-perpetrators share a common intent to commit genocide against Israeli Jews. The Hamas leadership – including Yahya Sinwar, Mohammed Deif and Ismail Haniyeh – demonstrated this intent through explicit statements, such as Deif's October 7th call to 'kill them wherever you may find them', and through operational planning, evidenced by captured documents instructing fighters to murder women

[66] *Tadić* (n 23) paras 227–28.

[67] ibid para 232.

[68] ICTY, *Prosecutor v Vasiljevic*, Judgment, IT-98-32-T, Trial Chamber, 29 November 2002.

[69] ICTY, *Prosecutor v Kvocka and Others*, Appeals Chamber, IT-98-30/1-A, 28 February 2005; ICTY, *Prosecutor v Krnojelac*, Judgment, IT-97-25-A, Appeals Chamber, 17 September 2003.

[70] ICTY, *Prosecutor v Stakic*, Judgment, IT-97-24-T, Trial Chamber, 31 July 2003; ICTY, *Prosecutor v Simic and Others*, Judgment, IT-95-9-T, Trial Chamber, 17 October 2003.

[71] ICTY, *Prosecutor v Brđanin*, Decision on Motion for Acquittal under Rule 98bis, IT-99-36T, Trial Chamber, 28 November 2003; ICTY, *Prosecutor v Brđanin*, Decision on Interlocutory Appeal, IT-99-36-A, Appeals Chamber, 19 March 2004; ICTY, *Prosecutor v Milošević*, Decision on Motion for Judgment of Acquittal, IT-02-54-T, Trial Chamber, 16 June 2004.

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and children. The organisation's foundational ideology, rooted in the call of the 1988 Convention to 'obliterate' Israel,[72] and its decades-long indoctrination of fighters via militarised education, ensured that lower-ranking perpetrators acted in concert with this shared purpose. The coordinated massacre of 1,200 Israelis across 22 towns and the Nova Festival, marked by systematic targeting of Jews, aligns the *actus reus* of killing and causing serious harm with a collective *mens rea* to destroy the group 'as such', satisfying the requirements of JCE I as established in *Prosecutor v Tadić*.[73]

Attributing genocidal intent from Hamas leaders to lower-ranking perpetrators is further justified by the group's centralised command and pervasive ideological conditioning, bridging any gap in individual comprehension of the broader goal. Operating as Gaza's de facto authority since 2007 with a 'highly organized' structure,[74] Hamas disseminated its intent through detailed attack plans – like those for Kibbutz Sa'ad and Be'eri – executed by the Izz al-Din al-Qassam Brigades. Even if some fighters lacked a nuanced understanding of genocide, their enthusiastic participation, evidenced by audio recordings bragging of killing Jews 'with my own hands', reflects alignment with the leadership's directives. The ICTY in *Krstić* held that intent can be inferred from participation in a coordinated plan.[75] At the same time, *Akayesu* emphasised the role of context[76] – here, the systematic dehumanisation by Hamas of Jews as 'sons of pigs and monkeys'. For peripheral actors, JCE III supplements this analysis: their willing execution of orders in a foreseeably genocidal campaign, marked by torture and rape, imputes liability even absent personal intent, ensuring the concurrence of *actus reus* and *mens rea* across the organisation.

6. The physical element: Analysing Hamas' actions on October 7th

While the events of October 7th are well known in Israel and much of the western world, it remains necessary to describe them briefly. On October 7th 2023, thousands of armed Hamas terrorists tore down large parts of the Gaza security perimeter and invaded southern Israel. The invasion was accompanied by a barrage of thousands of rockets fired at Israel. Hamas' highly trained terrorist fighters breached over 30 points in the 40-mile security fence, using an array of technologies and tactics. Hamas terrorists also crossed the barrier into Israeli territory using paragliders.

The terrorists split up, conquering and taking control of over 20 Israeli towns. Terrorists also attacked the Nova Music Festival near the town of Re'im. Their goal was to murder as many Jews as possible. During that day, over 1,200 Israelis were tortured, mutilated and massacred, including women, children and the elderly, and

[72] Covenant of the Islamic Resistance Movement, 18 August 1988, The Avalon Project, https://avalon.law.yale.edu/21st_century/hamas.asp (Hamas Covenant).

[73] *Tadić* (n 23) para 227.

[74] Brian Carter with Daniel Mealie, 'The Order of Battle of Hamas' Izz al Din al Qassem Brigades, Part 1: North and Central Gaza', Institute for the Study of War, 8 December 2023, https://www.understandingwar.org/backgrounder/order-battle-hamas%E2%80%99-izz-al-din-al-qassem-brigades-part-1-north-and-central-gaza.

[75] *Krstić* Appeal (n 61) para 135.

[76] *Akayesu* (n 60) para 523.

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over 200 were abducted back to Gaza.[77] Comparatively, the October 7th attack was the most deadly in Israel's history and the third most lethal attack in modern history.[78]

Hamas' murderous attack was also accompanied by sexual violence and rape. According to a report issued by the Association of Rape Crisis Centres in Israel, systematic sexual assaults took place at the site of the Nova Festival, kibbutzim and villages, IDF army bases and against hostages held in captivity. Many of these assaults were carried out by multiple perpetrators and in front of family members. Women at the festival who tried to escape were hunted down and then assaulted. The report also notes evidence of tying and binding, as well as the mutilation of the sexual organs of girls, women and men.[79]

A report by the UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict summarised its findings after a two-and-a-half-week mission to Israel:[80]

> Based on the information gathered by the mission team from multiple and independent sources, there are reasonable grounds to believe that conflict-related sexual violence occurred during the 7 October attacks in multiple locations across Gaza periphery, including rape and gang rape, in at least three locations. Across the various locations of the 7 October attacks, the mission team found that several fully naked or partially naked bodies from the waist down were recovered – mostly women – with hands tied and shot multiple times, often in the head. Although circumstantial, such a pattern of undressing and restraining of victims may be indicative of some forms of sexual violence.

The above-mentioned acts clearly fall within Article II(a) and (b) of the Genocide Convention: killing members of the group (Israeli Jews) and causing serious bodily and mental harm to members of the group.

7. Establishing specific intent: Hamas' ideology, planning and actions

While the scale and brutality of the attacks of October 7th establish the physical element of genocide through killings and serious bodily harm to Israeli Jews, the more complex question is whether these acts were committed with the specific intent to

[77] For a description of the events see Israeli Ministry of Foreign Affairs, 'Hamas-Israel Conflict 2023: Key Legal Aspects', 2 November 2023, https://www.gov.il/BlobFolder/news/hamas-israel-conflict2023-key-legal-aspects/en/English_Documents_Hamas-Israel%20Conflict%202023%20-%20Some%20Factual%20and%20Legal%20Aspects%20-%20Israel%20Ministry%20of%20Foreign%20Affairs%20(2%20NOV%202023).pdf; Israel Defense Forces, 'The October 7 Inquiries', https://www.idf.il/en/mini-sites/7-10-the-inquiries.

[78] Daniel Byman and others, 'Hamas's October 7 Attack: Visualizing the Data', Center for Strategic and International Studies (CSIS), 19 December 2023, https://www.csis.org/analysis/hamass-october-7-attack-visualizing-data.

[79] Carmit Klal-Chalamish, 'Silent Cry – Sexual Violence Crimes on October 7', Association of Rape Crisis Centers in Israel, 24 February 2024, https://www.1202.org.il/wp-content/uploads/2025/01/ARCCI-report-sexual-crimes-on-october-7-updated-26.3.pdf.

[80] Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC), 'Mission Report: Official Visit of the Office of the SRSG-SVC to Israel and the Occupied West Bank 29 January – 14 February 2024', 4 March 2024, para 12.

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destroy this group 'as such'. As the ICJ and international tribunals have consistently held, genocidal intent can be inferred from both direct evidence and patterns of conduct. In Hamas' case, the systematic nature of the attacks – their careful planning, coordinated execution across multiple locations and deliberate targeting of civilians – provides the first indication of such intent. However, to fully establish the *dolus specialis* required by the Genocide Convention, we must examine these actions within the broader context of the Hamas ideology, its preparations and stated objectives. This analysis reveals that these attacks were not merely acts of terror or military strategy, but rather the culmination of a systematic policy aimed at the destruction of Israeli Jews as a distinct national, ethnic and racial group.

The Hamas killings on October 7th were motivated by an intent to destroy Israeli Jews as a distinct ethnic, racial and national group. The specific genocidal intent can be inferred from a careful examination of Hamas' antisemitic worldview enshrined in its foundational Covenant, the systematic anti-Jewish policies that it has advanced over decades, statements of top officials both before and during October 7th , and the existence of a specific plan to destroy Israel and its Jewish population.

As Professor Schabas explains:[81]

> The specific intent necessary for a conviction of genocide is even more demanding than that required for murder. The crime must be committed with intent to destroy, in whole or in part, a protected group, as such. If the accused accompanied or preceded the act with some sort of genocidal declaration or speech, its content may assist in establishing the special intent. In practice, because of the large scale of genocide, its association with a State plan or policy, and the requirement of a racist climate in public opinion, as a minimum, there is actually no shortage of examples in the case law of perpetrators betraying their intent through public speeches or in meetings with others. Otherwise, the prosecution will rely on the context of the crime, its massive scale, and elements of its perpetration that suggest hatred of the group and a desire for its destruction.

This article adopts the narrowest definition of intent, as opposed to more expansive knowledge-based definitions,[82] as finding that the acts committed satisfy this definition inherently satisfy the broader concepts.

The death toll on October 7th was limited only by the capabilities of Hamas to murder Israeli Jews, and not by any redline or moral inhibition. While Hamas may not have been able to destroy all Israeli Jews realistically, their weakness should not work to their benefit. As international tribunals have already stated, the perpetration of genocide is always limited by the capacity and reach of the genocidaires themselves.[83]

[81] William A Schabas, *Genocide in International Law: The Crime of Crimes* (2nd edn, Cambridge University Press 2009) 265.

[82] See, eg, Katherine Goldsmith, 'The Issue of Intent in the Genocide Convention and its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-based Approach' (2010) 5(3) *Genocide Studies and Prevention: An International Journal* 238.

[83] *Krstić* (n 61) para 13.

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7.1. Hamas' genocidal worldview and its systematic propagation

Hamas is both a Sunni Islamist and a Palestinian nationalist movement. Emerging out of the Palestinian Muslim Brotherhood into an independent organisation in the 1980s, it is ideologically committed to the destruction of Israel and the establishment of an Islamic state in all of historical Palestine. Hamas emphasises *jihad* and violent struggle as the sole means of achieving its goal.[84] The war against Israel is a religious and existential one:[85]

> [I]n the view of Hamas, the Palestinian–Israeli conflict is not merely a territorial dispute between Palestinians and Israelis: it is first and foremost a 'war of religion and faith' between Islam and Judaism and between Muslims and Jews. As such, it is portrayed as an unbridgeable dichotomy between two opposing absolutes—as a historical, religious, and cultural conflict between faith and unbelief, between the true religion that supersedes all previous religions, that is, Islam, and the abrogated superseded religion, Judaism. It is a war between good, personified by the Muslims representing the party of God (*Hizballah*), and 'the party of Satan' (*hizb al-shaytan*) represented by the Jews. Consequently, the conflict is considered an 'existential battle, rather than a dispute over borders' (*ma'rakat wujud wa-la hudud*).

While Sunni movements generally de-emphasise the millennialist end goal of *jihad*, Hamas has invested the war against the Jews with messianic and eschatological meaning. The destruction of the Jews is required for the establishment of the divine kingdom on earth.[86] Its foundational Covenant, adopted in August 1988, references an Islamic tradition according to which '[t]he Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say "O Moslems, O Abdulla, there is a Jew behind me, come and kill him"'.[87]

Hamas took control of the Gaza Strip in 2007, following a brief civil war with the Palestinian Authority and its ruling Fatah party. According to a 2014 survey carried out by the Anti-Defamation League, 93 per cent of Palestinians in Gaza and the West Bank hold hard-core antisemitic views.[88]

In November 2013, Hamas introduced a new curriculum to Gazan schools, deviating from the approved Palestinian Authority textbooks. The Hamas curriculum serves as a critical means to impart the movement's anti-Semitic ideology to younger generations. As described by *The New York Times*:[89]

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[84] Hamas Covenant (n 72).

[85] Meir Litvak, '"Martyrdom is Life": Jihad and Martyrdom in the Ideology of Hamas' (2010) 33 *Studies in Conflict and Terrorism* 716, 717–18; Shaul Bartal, 'Ḥamās: The Islamic Resistance Movement' in Muhammad Afzal Upal and Carole M Cusack (eds), *Handbook of Islamic Sects and Movements* (Brill 2021) 379.

[86] Litvak (n 85) 727.

[87] Hamas Covenant (n 72) art 7.

[88] 'Global 100: Index of Antisemitism – West Bank and Gaza', Anti-Defamation League, 2014, https://www.adl.org/adl-global-100-index-antisemitism.

[89] Fares Akram and Jodi Rudoren, 'To Shape Young Palestinians, Hamas Creates Its Own Textbooks', *The New York Times*, 4 November 2013, https://www.nytimes.com/2013/11/04/world/middleeast/to-shape-young-palestinians-hamas-creates-its-own-textbooks.html.

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> What Gaza teenagers are reading in their 50-page hardcover texts this fall includes references to the Jewish Torah and Talmud as 'fabricated,' and a description of Zionism as a racist movement whose goals include driving Arabs out of all of the area between the Nile in Africa and the Euphrates in Iraq, Syria and Turkey.
>
> 'Palestine,' in turn, is defined as a state for Muslims stretching from the Jordan River to the Mediterranean Sea. A list of Palestinian cities includes Haifa, Beersheba and Acre – all within Israel's 1948 borders. And the books rebut Jewish historical claims to the territory by saying, 'The Jews and the Zionist movement are not related to Israel, because the sons of Israel are a nation which had been annihilated'.

Since September 2012, Hamas has run a programme for high school students in Gaza, providing them with theoretical and practical military training. In the course of its youth programme, students learn to handle assault rifles, hand grenades and other deadly arms. The programme is directed by the Hamas-run Ministries of Education and the Interior, with the cooperation of the Hamas security services and the Izz al-Din al-Qassam military wing. Hamas has explicitly stated that the goal of its youth military training is to prepare Gazans for 'the expulsion of the Zionist occupation from the land of Palestine'.[90]

In March 2023, UN Watch and the Institute for Monitoring Peace and Cultural Tolerance in School Education (IMPACT-se) released a report detailing the incitement to hatred, antisemitism and terrorism rampant in the United Nations Relief and Works Agency in the Near East (UNRWA) school system in Gaza. Examples given in the report are conspiracy theories about Jewish world domination; praising Hitler; glorifying terrorists such as Diaa Hamarsheh, who murdered five people in a March 2022 attack in the Israeli city of Bnei Brak; praising Lion's Den terrorists who carried out recent terrorist attacks in the West Bank; and glorifying other terrorists affiliated with Hamas, Palestinian Islamic Jihad and the Al-Aqsa Martyrs Brigades.[91] It must be stressed that Hamas is the de facto ruling authority in Gaza and its fighters in Gaza have gone through either the UNRWA or Hamas education system.

Hamas' senior officials and official broadcasts share the organisation's genocidal worldview. Its leaders dehumanise Jews as enemies of God and Islam, frequently referring to them as 'sons of pigs and monkeys', an epithet originating in Islamic tradition. The war against them is portrayed as religious and existential in character. Jews are depicted as corrupt, conniving and hostile to Muslims by nature. Hamas officials make explicit calls to kill Jews, and describe this as a religious duty. These statements have been made over decades and in varying contexts. They cannot

[90] 'Hamas Has Introduced a Program in Gaza Strip Schools called Al-Futuwwa, which Provides Military Training for Tens of Thousands of Adolescent Boys', The Meir Amit Intelligence and Terrorism Information Center, 24 April 2013, https://www.terrorism-info.org.il//Data/articles/Art_20511/E_069_13_65283962.pdf.

[91] 'UNRWA Education: Reform or Regression?', IMPACT-Se, March 2023, https://unwatch.org/wp-content/uploads/2023/03/2023-Report-UNRWA.pdf.

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then be dismissed as mere bellicose rhetoric; rather, they reflect Hamas' systematic incitement to the murder of Jews and the destruction of the State of Israel.

Below is a brief list of examples. The Middle East Media Research Institute (MEMRI), Palestinian Media Watch, and the Meir Amit Intelligence and Terrorism Information Center provided all examples and translations.

- Islamic scholar Hussein Qasem spoke on al-Aqsa TV, Hamas' official television state, on 23 June 2023, in which he repeated traditional Islamist canards of Jews as religious enemies of Islam and monotheism. He said: 'The Jews are not the enemies of the Palestinians alone – they are the enemies of humanity as a whole and the enemies of every monotheist in the world ... Why shouldn't we be furious? Why shouldn't we burn the ground under the Jews' feet?'[92]
- Hamas official Sheikh Hamad al-Regeb, in a Friday sermon in Gaza on 7 April 2023, called for Allah to destroy the Jews. This destruction was not limited to divine action but called for divine aid in Hamas' murderous actions. Al-Regeb used the traditional Islamist description of Jews as pigs and moneys. He said:[93]

> [Allah] transformed them [the Jews] into filthy, ugly animals like apes and pigs because of the injustice and evil they had brought about ... 'Oh Allah, bring annihilation upon the Jews. Oh Allah, bring annihilation upon the Jews. Paralyze them, destroy their entity, tear them apart, and bring upon them a terrible punishment. Oh Allah, enable us to get to the necks of the Jews. Oh Allah, enable us to get to the necks of the Jews. Oh Allah, enable us to get to the necks of the Jews'.

- Islamic scholar Wael al-Zard 'mused' on what Hamas would do to the Jews following their destruction of Israel. He spoke on al-Aqsa TV on 8 March 2023: 'What are we going to do with them [the Jews]? Will we throw them into the sea and make them into food for the fish?'.[94]
- Hamas TV Commentator Jamil Ziyada repeated the idea of Jews as irreconcilable enemies of Islam. The conflict is framed in religious terms, as the Jews killed the prophets as described in Islamic scriptures. On 23 June 2022 he said: 'We cannot possibly coexist and have neighbourly relations with

[92] 'Palestine Islamic Scholars Association Member Hussein Qasem: Jews Are Enemies of Humanity; We Are Thirsty for Their Blood', MEMRI: Middle East Media Research Institute, 23 June 2023, https://www.memri.org/tv/palestine-islamic-scholars-association-member-qasem-hamas-jews-enemies-humanity-thirsty-blood.

[93] 'Hamas Official Sheikh Hamad Al-Regeb Refers to Jews as "Brothers of Apes and Pigs" during a Rafah Friday Sermon, Prays for Annihilation of Polytheists and Atheists, Adds: "Oh Allah, Enable Us to Get to the Necks of the Jews"', MEMRI: Middle East Media Research Institute, 7 April 2023, https://www.memri.org/tv/rafah-gaza-friday-sermon-hamas-official-regeb-allah-necks-jews-annihilate-them .

[94] 'Gaza Islamic Scholar Wael Al-Zard on Hamas TV: "We Have Teams Planning What To Do with Israel's Nuclear Missiles Once We Liberate Palestine and Whether To Throw the Jews into the Sea"', MEMRI: Middle East Media Research Institute, 8 March 2023, https://www.memri.org/tv/gaza-islamic-scholar-zard-making-plans-what-to-do-with-nukes-throw-jews-into-sea.

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[the Jews, who are] slayers of prophets and messengers, and the slayers of the Palestinian people'.[95]

- Rajaa al-Halabi, head of Hamas Women's Movement, similarly promoted the idea of Jews as irresolute enemies of Islam at a Gaza rally on 9 July 2020. The Palestinians have the good fate of being the divine tool of the Jews' destruction:[96]

> Indeed, these are the Israelites. These are the Jews. They are the ones who slayed the prophets, the ones who acted treacherously and violated [sanctities] ... Indeed, my dear sisters, our conflict with the Zionist enemy is a matter of faith, not of borders. Needless to say, we will not make do with what we have here. We will not make do with partitioning the land and taking only a part of it. This land will be ours in its entirety, Allah willing because our conflict with the Zionist enemy is an existential conflict, not a conflict about borders. This enemy, who came from all corners of the world, has no place here, but this is what Allah wanted for them ... This is our fate, my beloved sisters – to be Allah's hand on Earth, the hand that will finish off the Israelites, this Zionist enemy, Allah willing. Allah brought them here in droves, so that Palestine becomes their graveyard, Allah willing.

- Hamas Member of the Palestinian Parliament Ismail al-Ashqar gave a statement in the Palestinian parliament on 23 August 2020, in which he called 'death to Israel' and 'burn the attacking sons of Zion'.[97]
- Hamas Member of Parliament Yunis al-Astal, in a 4 July 2020 sermon, framed the conflict as a religious one, according to which Hamas and Muslims must destroy Israel:[98]

> There is no doubt that by occupying this land, the Jews have filled this land with corruption, because Allah described them by saying: 'Whenever they kindle fire for war, Allah extinguishes it. They strive to spread corruption in the land.' Allah said that they are 'the worst of living creatures in the sight of Allah,' and that they are 'the strongest in enmity towards the believers.' There is no time to mention the many other evil attributes that Allah used to describe this kind of creature. Therefore, we must

[95] 'Hamas TV Commentator Jamil Ziyada: "We Cannot Coexist with the Jews; Life Is All about Fighting, Not Negotiations"', MEMRI: Middle East Media Research Institute, 23 June 2022, https://www.memri.org/tv/gaza-resident-cannot-coexist-with-the-jews-must-fight-them.

[96] 'Rajaa Al-Halabi, Head of Hamas Women's Movement: "We Are Destined To Do Allah's Will, Finish off the Treacherous Jews; Palestine Will Be Their Graveyard"', MEMRI: Middle East Media Research Institute, 9 July 2020, https://www.memri.org/tv/rajaa-halabi-head-hamas-womens-movement-finish-off-jews-palestine-graveyard.

[97] Jacques Zilberdik, 'One Day of Hamas TV Hate and Terror Messages: PMW Analysis', Palestinian Media Watch, 7 September 2020, https://palwatch.org/page/18206.

[98] 'Hamas MP Yunis Al-Astal: "The Jews Are Evil, Spread Corruption; Israel Must Be Finished Off"', MEMRI: Middle East Media Research Institute, 4 July 2020 https://www.memri.org/tv/hamas-mp-yunis-astal-jews-vile-creatures-spread-corruption-must-finish-off-israel.

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> invest every effort in finishing off this phenomenon [i.e. Israel], which is considered a stain on humanity and its history.

- Islamic Scholar Sheikh Nasser Maarouf promoted classical antisemitic theories, according to which Jews are responsible for the misfortunes of the world. He quotes Quranic texts, portraying the battle against the Jews as eternal and divinely commanded. In an interview on Hamas TV on 3 July 2020, he said:[99]

> Millions of people were killed, all because of these Jews, who ran wild, tyrannized the world and spread corruption in it. Their corruption affects all walks of life. Look at the poverty all over the world. Look at the blood that is being spilled all over the world. Look at the honour of women being violated all over the world. If you check, you find that it is the Jews who are behind all that. They are the ones feeding all corruption on earth, and they are the ones financing it. These are glad tidings for us, Allah willing. [The Quran says:] 'Those who disbelieve spend their wealth to avert [people] from the way of Allah. So they will spend it, then it will be for them a [source] of regret, and then they will be vanquished. And those who have disbelieved – unto Hell they will be gathered'.

- Hamas uses its media channels to incite genocide and murder of Jews. Song lyrics glorify terrorists and call upon Palestinians to emulate them. One such example is the song 'Expel the Thieving Occupier', broadcast on the official Hamas TV channel on 25 March 2019, 4 May 2019 and 12 November 2019. Its lyrics are:

> Expel the thieving occupier from the enraged land of Jerusalem, Rid your house of that one, that Zionist in his humiliation, Write 'death, death, death to Israel' with flowing blood, And with the bleeding body cause death, death, death to Israel. Khaibar, Khaibar,[100] O Jews, The soldiers of Muhammad have started to return. Be red death. Have no mercy on the army of aggression that wears the clothes of the soldier and the settler.[101]

- Hamas Political Bureau member Fathi Hammad has made it clear in many statements that Hamas' terrorism is not directed solely at the establishment of a Palestinian state in Gaza, Judea and Samaria but at the destruction of Israel and the annihilation of Jews worldwide. In July 2019 he said:[102]

[99] 'Palestinian Sheikh Nasser Maarouf: "The Jews Are behind All the Bloodshed, Corruption, Poverty in the World; They Will Ultimately Be Vanquished"', MEMRI: Middle East Media Research Institute, 3 July 2020, https://www.memri.org/tv/palestinian-sheikh-nasser-maarouf-jews-tyrannize-world-kill-millions-gathered-unto-hell.

[100] 'Khaibar' refers to a seventh century battle in which the Prophet Muhammad slaughtered an Arabian Jewish tribe. It is a common chant by modern Islamist groups.

[101] Al-Aqsa TV, '"Death to Israel" – Song on Hamas TV', Palestinian Media Watch, 12 November 2019, https://palwatch.org/page/15465.

[102] Al-Aqsa TV, 'Top Hamas Official Calls to "Slaughter" – "Every Jew on the Planet"', Palestinian Media Watch, 12 July 2019, https://palwatch.org/page/16693 (emphasis added).

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> There are seven million Palestinians abroad, enough of your warming up. You have Jews everywhere. *We must attack every Jew on the planet – slaughter and kill, Allah willing.* Enough of the warming up, enough … we have exploded … You will be killed, by Allah, you will be killed by our [explosive] belts, Allah willing … Everyone who wants, stand in line – belt, belt, belt – off you go. Say 'in Allah's name' and put your trust in Allah. However, to die when we are in this situation is impossible … let the Zionist enemy hear, this is a message… I will die as I blow up and cut – what? The necks of the Jews and their legs. We will tear them to shreds, Allah willing.

- On 15 May 2019 he said:[103]

> We have come to tell the Zionist enemy – including its people, its army, its government, and the Israeli Parliament – leave us, *for the day of your slaughter, extermination, and annihilation is near.* Each one of you should search for a place for yourself in Europe, or in any kind of stronghold, or in hell, or in the sea, or in the ocean, or in the Bermuda Triangle. You have no place in Palestine. You have no place on the land of Jerusalem. You have no place in the Al-Aqsa Mosque plazas, or in Jaffa, or in Haifa, or in Acre, or anywhere … leave us, for the day of your annihilation is near.

- Islamic scholar Dr Muhammad Suleiman al-Farra provided a religious ruling that the Quranic imperative of *jihad* applies to the Jews. He said in an interview on 3 February 2019:[104]

> 'Kill the polytheists wherever you may find them.' Today, you can rest assured that, according to the religious ruling, Palestine in its entirety constitutes a battlefield between us and the Jews. Therefore, we must strive to fight them using any means that might enable us to get to them anywhere in our pure land, in the hope of driving them out, Allah willing … It is our duty today to fight this criminal enemy. First of all, we should try to kill them – 'Kill the polytheists wherever you may find them …' [The verse continues:] '… and seize them' There is a second option of capturing them so we can swap them for our prisoners.

- Hamas senior official Ismail Radwan held a speech on 5 November 2018 in which he said:[105]

[103] Nan Jacques Zilberdik and Maurice Hirsch, 'Fatah Seeks Reconciliation with Hamas; Hamas Promises "Extermination" of Israel', Palestinian Media Watch, 23 May 2019, https://palwatch.org/page/15660 (emphasis in original).

[104] 'Gazan Scholar Dr. Muhammad Suleiman al-Farra: It Is Our Religious Duty To Fight the Jews and "Kill Them Wherever You May Find Them"', MEMRI: Middle East Media Research Institute, 13 February 2019, https://www.memri.org/tv/gazan-scholar-suleiman-farra-religious-duty-fight-jews-capture-prisoner-swaps.

[105] 'A Senior Hamas Figure Delivers a Speech Replete with Anti-Semitic Motifs – Yet Another Expression of Hamas's Long-Standing Tradition of Anti-Semitism', The Meir Amit Intelligence and

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> The land will spew them [those who do not support Hamas] out, Allah will be fed up with them, and they will be burned in the fire (hellfire) along with the apes and pigs.

- 'Apes and pigs' is a term for Jews in Islamist discourse, originating in Islamic exegetical tradition.

- Yahya Sinwar, the mastermind of the October 7th massacre, forewarned in a speech on 6 April 2018 by the Gaza fence: 'We will take down the border [with Israel] and we will tear out their hearts from their bodies'.[106]

This pervasive genocidal worldview, cultivated over decades, directly informed Hamas' actions on October 7th 2023, transforming ideological rhetoric into concrete violence. The systematic propagation of antisemitic hatred – through education, media, and leadership pronouncements – ensured that the attack was not an isolated outburst but the culmination of a deliberate policy to destroy Israeli Jews as a group. By embedding this intent within its organisational ethos and operational directives, Hamas bridged the gap between its doctrinal foundations and the mass killings, torture and sexual violence inflicted on that day. This continuity underscores that the October 7th atrocities were neither spontaneous nor merely tactical but rather the execution of a long-standing genocidal ambition, distinguishing Hamas' actions from conventional terrorism and aligning them with the legal threshold for genocide under international law.

7.2. Patterns of conduct demonstrate dehumanisation of Jews

According to ICTY case law, genocidal intent can also be inferred from 'the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts'.[107] In terms of their scale, indiscriminate nature, sheer brutality, depravity, and nexus with other war crimes and crimes against humanity, the events of October 7th speak for themselves of Hamas' intent to murder Jews. Hamas murdered 1,200 Israelis and committed acts of torture, mutilation, and sexual violence in 30 communities and locations. At least 37 minors were killed, six of whom were under the age of five, as well as at least 70 elderly people.[108] The nature of the attacks demonstrates Hamas' successful dehumanisation of Jews in the eyes of its militants.

Terrorism Information Center, 27 December 2018, https://www.terrorism-info.org.il/en/senior-hamas-figure-delivers-speech-replete-anti-semitic-motifs-yet-another-expression-hamass-long-standing-tradition-antisemitism.

[106] 'Hamas Leader Yahya Sinwar – We Will Tear out Their Hearts – April 6, 2018', Legal Insurrection, YouTube, 8 April 2018, https://www.youtube.com/watch?v=klFbf6VG7uA.

[107] ICTY, *Prosecutor v Jelisić*, Appeals Chamber, IT-95-10-A, 5 July 2001, para 47.

[108] All-Party Parliamentary Group for UK-Israel, '7 October Parliamentary Commission Report: Chaired by Lord Roberts of Belgravia', 46, https://static1.squarespace.com/static/67bf0490d422da027d74c55c/t/67d80d04b3bde77ec3ac2b66/1742212374048/The+7+October+Parliamentary+Commission+Report+-+The+Roberts+Report+-+APPG+UK-Israel.pdf.

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According to Dr Chen Kugel, head of Israel's forensics centre, scans revealed signs of torture and execution: people burned alive and bodies found with their hands bound before being executed.[109] At the Re'im music festival, at least 347 civilians were massacred, and others forcibly abducted to Gaza. At Kibbutz Be'eri, terrorists entered and slaughtered entire families in their homes; 80 per cent of the recovered bodies showed signs of torture. In the small town of Sderot, terrorists on motorcycles and trucks killed civilians on the street, on buses and in cars.[110]

Other war crimes and crimes against humanity systematically committed alongside acts of genocide include intentionally directing attacks against the civilian population, intentionally directing attacks against vehicles involved in humanitarian assistance (such as ambulances), murder and wilful killing, forcible transfer and deportation, unlawful confinement and imprisonment, torture, rape, ethnic persecution, enforced disappearance, inhumane acts and other wilful acts causing great suffering, the taking of hostages, mutilation, outrages upon personal dignity and degrading treatment, and the use of civilian shields.

The ICTR, in the *Akayesu* judgment, recognised that rape and sexual assault may constitute a form of genocide. During the Rwandan genocide, rape was used as a tool of destruction:[111]

> ... solely against Tutsi women, many of whom were subjected to the worst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or other public places, and often by more than one assailant. These rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.

Rape was also an essential part of the genocide of the Yazidi minority in Iraq by ISIS terrorists in 2014–15.[112]

Israeli police investigations, corroborated by independent inquiries from journalists such as *The New York Times* and *The Wall Street Journal*, demonstrate that Hamas used widespread and systematic sexual violence and rape on October 7th. Women's corpses were found naked with signs of genital abuse. An eyewitness at the Nova

[109] Anat Peled and Rory Jones, 'Israel's "Black Sabbath": Murder, Sexual Violence and Torture on Oct. 7', *The Wall Street Journal*, 31 December 2023, https://www.wsj.com/world/middle-east/israel-hamas-oct-7-murder-sexual-violence-torture-45aab439.

[110] 'Mapping the Massacres', The October 7th Geo-visualization Project, https://oct7map.com; 'Special Announcement – The Hamas Atrocities Documentation Center (HADC)', MEMRI: Middle East Media Research Institute, 17 November 2023, https://www.memri.org/reports/special-announcement-%E2%80%93-hamas-atrocities-documentation-center-hadc.

[111] *Akayesu* (n 60) para 731.

[112] Zeyad Jaffal, 'Rape as Genocide Crime in International Criminal Law – The Case of Yazidi Women in Iraq' (2020) 15(2) *International Journal of Criminal Justice Sciences (IJCJS)* 230; Paula Castellano San José, 'The Rapes Committed Against the Yazidi Women: A Genocide? A Study of the Crime of Rape as a Form of Genocide in International Criminal Law' (2019) 18 *Comillas Journal of International Relations*; Kimberly Lowe Frank, 'Rape as an Act of Genocide: History and Law', Violence Against Women Conference, Lesley University, 11 September 2018.

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music festival saw 100 men in military fatigues passing Israeli women around 'like an assembly point', stabbing them while raping them, slicing off breasts and beheading victims.[113] The mass rape was not a spur-of-the-moment exploitation by Palestinian terrorists but rather a premeditated assault on Jewish women. Documents captured on Hamas terrorists instructed them how to say in Hebrew 'Take your pants off' and 'Open your legs'.[114]

7.3. The Hamas Covenant

Hamas has made its intention to commit genocide against the Jewish people extremely clear in a long series of official documents and public statements.

Hamas' foundational charter, adopted in August 1988, is replete with virulent antisemitic conspiracy theories, even referencing the notorious Protocols of the Learned Elders of Zion. The Covenant is explicit in its murderous intention to kill Jews. Some excerpts:

- 'Israel will exist and will continue to exist until Islam will obliterate it, just as it obliterated others before it'.
- 'The time will not come until Muslims will fight the Jews; until the Jews hide behind rocks and trees, which will cry: "O Muslim! There is a Jew hiding behind me, come on and kill him"'.
- 'The Nazism of the Jews does not skip women and children, it scares everyone. They make war against people's livelihood, plunder their moneys and threaten their honor ... They took advantage of key elements in unfolding events, and accumulated a huge and influential material wealth which they put to the service of implementing their dream'.
- '[Jews] control the world media [and use their] wealth to stir revolutions ... They stood behind the French and the Communist Revolutions'.
- 'There was no war that broke out anywhere without their [Jews'] fingerprints on it'.[115]

Hamas' original charter makes it clear that the war against Israel and the Jews is an existential battle. Palestine is sacred Muslim land, making any compromise or recognition of the Jewish state impossible. The only possible solution to the Palestinian problem is uncompromising *jihad* and struggle until Israel is annihilated. The Covenant traffics in crude antisemitic tropes, including Jewish responsibility for the French and Communist Revolutions, the First and Second World Wars, the collapse of the Islamic Caliphate, and in the nefarious creation of secret societies such as the Freemason and Rotary Clubs.

[113] Jeffrey Gettleman, Anat Schwartz and Adam Sella, 'Screams Without Words: How Hamas Weaponized Sexual Violence on Oct. 7', *The New York Times*, 30 December 2023, https://www.nytimes.com/2023/12/28/world/middleeast/oct-7-attacks-hamas-israel-sexual-violence.html.

[114] 'Disturbing ⚠. On Nov 2, an Arabic-Hebrew transliteration glossary belonging to Hamas was discovered in Israel with sexual terminology, including "take your pants off". This evidence suggests that Hamas terrorists planned to systematically rape Israeli women. This Is a War Crime': Official X account of the State of Israel, 12 November 2023, https://x.com/Israel/status/1723759157960953981.

[115] Hamas Covenant (n 72).

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Hamas issued a 'kinder' and 'friendlier' document in 2017, outlining its principles and goals. Although it removes most of the explicitly anti-Jewish language of the 1988 document, it remains eliminationist in its approach to Israel, denying any legitimacy to the Jewish state and justifying violent 'resistance' to bring about its destruction.

- Article 19: 'There shall be no recognition of the legitimacy of the Zionist entity. Whatever has befallen the land of Palestine in terms of occupation, settlement building, Judaisation changes to its features or falsification of facts is illegitimate. Rights never lapse'.
- Article 25: 'Resisting the occupation with all means and methods is a legitimate right guaranteed by divine laws and by international norms and laws. At the heart of these lies armed resistance, which is regarded as the strategic choice for protecting the principles and the rights of the Palestinian people'.[116]

At the time of its adoption, some commentators argued that the new Covenant might herald ideological or pragmatic changes in Hamas behaviour.[117] However, the new document reaffirms that Israel's existence has no validity. Israel's Jewish population must either leave Palestine or face destruction at the hands of the Islamic Resistance Movement. Furthermore, Hamas' actions since 2017 have demonstrated conclusively that its commitment to antisemitic violence has not abated. The antisemitic rhetoric discussed in previous sections of this article came after the new Covenant. Hamas has carried out hundreds of violent terrorist attacks against Israeli civilians since then.[118] The October 7th attacks themselves, with their systematic atrocities, are conclusive proof that Hamas has not moderated or seriously changed its stance on Jewish statehood.

7.4. The existence of a genocidal plan

While the existence of a plan or a policy to commit genocide is not a legal element of the crime, international case law has treated such plans as decisive evidence of genocidal intent.[119] On 30 September 2021, Yahya Sinwar, leader of Hamas in Gaza, sponsored a conference in Gaza to prepare for the supposedly forthcoming 'liberation of Palestine'. Entitled 'The Promise of the Hereafter', referencing the eschatological significance of Israel's destruction, Sinwar emphasised that in the wake of the May 2021 Hamas–Israel War, 'the battle for the liberation and the return to Palestine have become closer now than ever before'. Following Israel's destruction, Jews who have served in the army would be killed, while those who fled may be left alone or prosecuted for their crimes. Educated Jews and other experts would

[116] 'Hamas in 2017: The Document in Full', *Middle East Eye*, 2 May 2017, https://www.middleeasteye.net/news/hamas-2017-document-full.

[117] Colin P Clarke, 'Hamas's Strategic Rebranding', *RAND*, 17 May 2017, https://www.rand.org/pubs/commentary/2017/05/hamas-strategic-rebranding.html.

[118] 'Monthly Reports', Israel Security Agency (Shabak), https://www.shabak.gov.il/en/reports.

[119] *Jelisic* (n 59) para 98; ICTR, *Prosecutor v Kayishema and Ruzindana*, Appeals Judgment, ICTR-95-1-A, Appeals Chamber, 1 June 2001, para 138; ICTY, *Stakic* (n 70) paras 546–547; ICTY, *Prosecutor v Popovic and Others*, Judgment, IT-05-88-T, Trial Chamber II, 10 June 2010, paras 856, 858, 886.

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be prevented from leaving until they repaid their debts to the Palestinians.[120] It should be pointed out that according to the Hamas religious authorities, such as Sheikh Yousef Qaradawi, Israel is defined as a military society where every civilian is a potential soldier. As such, killing 'soldiers' refers to all Jewish civilians.[121] In fact, according to a report in *Ha'aretz* newspaper, so confident was the Hamas leadership of its victory on October 7th, which would result in Israel's destruction, that they divided the country into governing cantons.

As described by a former high-ranking Fatah official:[122]

> So strongly did they believe in the idea that Allah was with them and that they were going to bring Israel down, that they started dividing Israel into cantons, for the day after the conquest ... One day, a well-known Hamas figure calls and tells me with pride and joy that they are preparing a full list of committee heads for the cantons that will be created in Palestine. He offers me the chairmanship of the Zarnuqa Committee, where my family lived before 1948.

More specifically, secret documents captured following the October 7th attack demonstrate that the massacre was meticulously and systematically planned in advance and had the goal of killing as many Jews as possible. Documents recovered on bodies of terrorists, for example, demonstrate detailed maps of the Israeli kibbutz of Sa'ad, with instructions to murder women and children. *NBC News* quoted an Israeli army official saying that 'the level of specificity would cause anyone in the intelligence field's jaw to drop'.[123] In Kibbutz Beeri, Hamas terrorists were found with a notebook containing handwritten Quranic verses and orders to '[k]ill as many people and take as many hostages as possible'.[124] Detailed maps were also found for Israeli communities such as Kfar Aza, Nahal Oz and Alumim, demonstrating

[120] 'Hamas-Sponsored "Promise of the Hereafter" Conference for the Phase Following the Liberation of Palestine and Israel's "Disappearance": We Must Differentiate between Jews Who Should and Should Not Be Killed, and Prevent a Jewish "Brain Drain" from Palestine', MEMRI: Middle East Media Research Institute, 4 October 2021, https://www.memri.org/reports/hamas-sponsored-promise-hereafter-conference-phase-following-liberation-palestine-and.

[121] 'Sheikh Yusuf al-Qaradawi and His Impact on the Dissemination of Radical Islam', The Meir Amit Intelligence and Terrorism Information Center, 6 October 2022, https://www.terrorism-info.org.il/en/sheikh-yusuf-al-qaradawi-and-his-impact-on-the-dissemination-of-radical-islam. For Qaradawi as Hamas' spiritual authority see Shaul Bartal and Nesya Rubinstein-Shemer, *Hamas and Ideology: Sheikh Yūsuf al-Qaraḍāwī on the Jews, Zionism and Israel* (Routledge 2017).

[122] Shlomi Eldar, 'Hamas Actually Believed It Would Conquer Israel, and Divided It into Cantons', *Ha'aretz*, 5 April 2024, https://www.haaretz.com/israel-news/2024-04-05/ty-article-magazine/.highlight/hamas-actually-believed-it-would-conquer-israel-and-divided-it-into-cantons/0000018e-ab4a-dc42-a3de-abfad6fe0000.

[123] Anna Schecter, '"Top Secret" Hamas Documents Show that Terrorists Intentionally Targeted Elementary Schools and a Youth Center', *NBC Universal News Group*, 14 October 2023, https://www.nbcnews.com/news/investigations/top-secret-hamas-documents-show-terrorists-intentionally-targeted-elem-rcna120310; Patrick Kingsley and Ronen Bergman, 'The Secrets Hamas Knew about Israel's Military', *The New York Times*, 14 October 2023, https://www.nytimes.com/2023/10/13/world/middleeast/hamas-israel-attack-gaza.html.

[124] Shira Rubin and Joby Warrick, 'Hamas Envisioned Deeper Attacks, Aiming to Provoke an Israeli War', *The Washington Post*, 13 November 2023, https://www.washingtonpost.com/national-security/2023/11/12/hamas-planning-terror-gaza-israel.

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Hamas' extensive intelligence gathering.[125] The coordinated massacres took place in 22 Israeli towns and villages, although Hamas intended to move further to major Israeli cities.[126]

7.5. Statements by Hamas leaders and militants on October 7th

Genocidal intent can also be inferred from statements demonstrating that the perpetrators selected the victims because of their membership of the group that they seek to destroy.[127] Hamas' intent to perpetrate genocide against Israeli Jews is clearly expressed in statements issued by its leaders in the immediate aftermath of the October 7th attack. On that day Hamas military commander Mohammed Deif issued a call:[128]

> This is the day that you make this criminal enemy understand that its time is up. [The Quran says:] 'Kill them wherever you may find them' ... I say to our people in occupied [pre-1967 Israel] – in the Negev, the Galilee, the Triangle, Haifa, Jaffa, Acre, Lod, and Ramla: Torch the earth under the feet of the plundering occupiers – kill, burn, destroy, and shut down roads. Make the cowardly occupiers understand that the Al-Aqsa Deluge is bigger than they think.

Hamas political leader Ismail Haniyeh said on the day of the attack that the goal was the destruction of Israel and the murder and ethnic cleansing of its people.[129]

This intent was not limited to the Hamas leadership alone. For example, audio recordings sent by terrorists that perpetrated the massacres themselves have them bragging: 'Look how many I killed with my own hands, your son killed Jews ... Ten with my own bare hands. Their blood is on my hands'.[130]

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[125] 'In Coded Doc, Hamas Instructed Terrorists to Kill Civilians, Take Captives', *The Times of Israel*, 15 October 2023, https://www.timesofisrael.com/in-coded-doc-hamas-instructed-terrorists-to-kill-civilians-take-captives-report.

[126] Ronen Bergman and Adam Goldman, 'Israel Knew Hamas's Attack Plan More than a Year Ago', *The New York Times*, 30 November 2023, https://www.nytimes.com/2023/11/30/world/middleeast/israel-hamas-attack-intelligence.html.

[127] *Jelisic* (n 59) para 73; ICTY, *Prosecutor v Karadžić*, Decision on Appeal of Trial Chamber's Decision on Preliminary Motion to Dismiss Count 11 of the Indictment, IT-95-5/18-AR72.5, Appeals Chamber, 9 July 2009, paras 97–99.

[128] 'Hamas Military Commander Mohammed Deif Announces Launch of Operation Al-Aqsa Deluge, Calls on Palestinians in West Bank, Jerusalem, and Israel Proper to Attacks with Guns, Knives, Vehicles', MEMRI: Middle East Media Research Institute, 7 October 2023, https://www.memri.org/tv/hamas-military-commander-deif-operation-aqsa-deluge-calls-palestinian-carry-out-attacks.

[129] 'Al-Jazeera Airs Hamas Leader Ismail Haniyeh's Statement on Hamas's Invasion of Southern Israel: I Call on Palestinians in the West Bank, Israeli Arabs, and the Entire Nation Abroad to Join the Battle; to the Enemy I Say: Get out of Our Land!', MEMRI: Middle East Media Research Institute, 7 October 2023, https://www.memri.org/tv/hamas-leader-ismail-haniyeh-statement-jazeera-operation-aqsa-deluge-palestinains-west-bank-israel-abroad-join-battle.

[130] 'Listen: "Your Son Killed 10 Jews", Hamas Terrorist Tells Gazan Parents', *The Jerusalem Post*, 24 October 2023, https://www.jpost.com/middle-east/article-769989.

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8. Weaponising genocide claims: South Africa's ICJ case as a rhetorical shield

8.1. Genocide inversion: A defining feature of the Hamas attack

Recognition of Hamas' genocide cannot be fully understood without examining how accusations of genocide have themselves become weaponised in this conflict. A distinctive feature of the Hamas genocide of October 7th is how its perpetrators and allies have simultaneously accused its victims of the same crime. This pattern of genocide inversion not only complicates efforts to establish legal accountability but also serves as a strategic tool to shield Hamas from the consequences of its actions.

Hamas' genocide of Israeli Jews is uniquely characterised by the immediate deployment of reverse accusations against its victims. Within weeks of the October 7th attacks, South Africa filed an application with the International Court of Justice alleging Israeli genocide in Gaza. This was not merely coincidental timing. The close ties between South Africa's ruling party and Hamas, including meetings with the Hamas leadership in December 2023, suggest a coordinated strategy to use genocide accusations as both shield and sword.[131] This pattern of genocide inversion serves three distinct purposes: (i) it deflects attention from Hamas' own genocidal actions; (ii) it appropriates the moral weight of genocide accusations to delegitimise Israel's military response; and (iii) it exploits and inverts Jewish historical trauma by comparing Israeli actions with the Nazi genocide.

While, legally speaking, accusations of Israeli genocide are irrelevant to an analysis of Hamas' actions, they are indeed linked in the public consciousness. Hamas has succeeded in tying 'Israel' and 'genocide' together. While a full-scale rebuttal of South Africa's claims against Israel requires a separate article, it is necessary to examine the charges of genocide against Israel, as through their contrast the case against Hamas becomes clearer. The reverse genocide accusation against Israel is a defining feature of the October 7th Hamas genocide and any analysis that ignored it would therefore be incomplete.

This section will briefly examine South Africa's claims in its application and then proceed to demonstrate how claims of Israeli genocide are used, intentionally or incidentally, as a rhetorical shield to blunt recognition of the Hamas genocide.

8.2. Analysis of the South African application

South Africa's claims, detailed at length in an 84-page application, have two principal sections: it reviews various Israeli military actions in Gaza, describing them as genocidal acts, then couples these acts with belligerent statements made by Israeli politicians throughout the war as proof of genocidal intention. As will be demonstrated, South Africa relies on ascribing genocidal motivation to military actions without the necessary evidence of such motivation. South Africa's legal team, in its oral presentation before the ICJ in January 2024, acknowledged Israel's lack

[131] Charles Asher Small, *South Africa, Hamas, Iran, and Qatar: The Hijacking of the ANC and the International Court of Justice* (Institute for the Study of Global Antisemitism and Policy (ISGAP) 2024) 42, https://isgap.org/wp-content/uploads/2024/11/SA_Report_Final_121124-2.pdf.

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of a genocidal plan, stating that 'genocides are never declared in advance'.[132] Such a statement is historically false, as the Final Solution, the Rwandan genocide and the Yugoslav atrocities were all methodically and systematically planned in advance.[133] The drafters of the Genocide Convention went to pains to distinguish between the systematic destruction of a protected group and large-scale casualties on the battlefield. As legal scholars Hirad Abtahi and Philippa Webb describe:[134]

> The infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide. In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses. It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide.

Paragraphs 45 to 49 of the South African application detail the 'killing of Palestinians in Gaza'. South Africa's central claim, based on the Hamas-run Health Ministry data, is that over 21,000 Palestinians had been reported killed and an additional 7,780 people missing (at that time).[135] Of course, assuming the reliability of Hamas' figures, this number does not distinguish between combatants and civilians. It assumes that civilians killed were intentionally targeted by Israel, as opposed to having been killed incidentally as part of a legitimate proportionality calculation according to the laws of armed conflict (LOAC). Finally, even if a disproportionate number of civilians were killed in a strike on a lawful target, this would be a violation of Israel's obligations under the LOAC, not the Genocide Convention. It should be noted that there are at least six statistical analyses that question the reliability of the Hamas-run Health Ministry's casualty figures.[136]

[132] 'Israel Shows "Chilling" Intent to Commit Genocide in Gaza, South Africa Tells UN Court', *The Guardian*, 11 January 2024, https://www.theguardian.com/law/2024/jan/11/south-africa-accuses-israel-of-genocide-gaza-the-hague-international-court-of-justice.

[133] See Hans Mommsen, 'The Realization of the Unthinkable: The "Final Solution of the Jewish Question" in the Third Reich' in Gerhard Hirschfeld (ed), *The Policies of Genocide (RLE Nazi Germany & Holocaust)* (Routledge 2015) 97; Jean Mukimbiri, 'The Seven Stages of the Rwandan Genocide' (2005) 3 *Journal of International Criminal Justice* 823.

[134] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (2 vols) (Brill 2008) 231.

[135] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures, 29 December 2023, para 45.

[136] Gabriel Epstein, 'Gaza Fatality Data Has Become Completely Unreliable', The Washington Institute for Near East Policy, 26 May 2024, https://www.washingtoninstitute.org/policy-analysis/gaza-fatality-data-has-become-completely-unreliable; Mark Zlochin, 'The Numbers of Dead in Gaza Don't Add up – and There Is No Easy Explanation', *The Telegraph*, 28 March 2024, https://www.telegraph.co.uk/global-health/terror-and-security/unrwa-staff-death-toll-gaza-israel-hamas-war-data; Tom Simpson, Lewi Stone and Gregory Rose, 'Statistically Impossible: A Critical Analysis of Hamas's Women and Children Casualty Figures', *Fathom Journal*, March 2024, https://fathomjournal.org/statistically-impossible-a-critical-analysis-of-hamass-women-and-children-casualty-figures; Gabriel Epstein, 'How Hamas Manipulates Gaza Fatality Numbers: Examining the Male Undercount and Other Problems', The Washington Institute

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Similarly, paragraphs 51 to 54 detail bodily injuries incurred by Palestinians as a result of Israeli operations, while paragraphs 88 to 94 describe the destruction of homes and property in the Gaza Strip. South Africa's application does not consider the unique challenges and destructiveness of urban warfare.[137] Nor does the application take into account Hamas' well-documented practice of using human shields and hiding in densely populated civilian areas.[138] Based on the South African application, there is no way of knowing whether the harm to persons or property was intentional, incidental to a valid proportionality analysis, or disproportionate under the LOAC.

Israeli advance warnings, a humanitarian measure to distance civilians from the battlefield, are deliberately misconstrued as 'mass expulsion from homes and displacement of Palestinians in Gaza'. The duty to provide 'effective advance warning' is enshrined in Article 57(2)(c) of Additional Protocol I of 1977[139] and is recognised in many military manuals. It is also the practice of the United States, the United Kingdom and other Coalition forces in Afghanistan and Iraq.[140]

The supposed Israeli siege of Gaza is described in paragraphs 61 to 70 as proof of Israel's intention to starve Palestinian civilians. Siege, meaning the encircling and isolation of enemy forces to induce their surrender, is a lawful tactic of war, regulated most notably in Article 27 of the Hague Convention of 1907[141] and Articles 17 and 23 of the Fourth Geneva Convention,[142] among others.[143] Despite a brief 'complete siege' from 9 October until 21 October 2023, Israel imposes no limitations other than security arrangements on the entry of food and supplies into Gaza.[144] Compared with

for Near East Policy, 25 January 2024, https://www.washingtoninstitute.org/policy-analysis/how-hamas-manipulates-gaza-fatality-numbers-examining-male-undercount-and-other; Abraham Wyner, 'How the Gaza Ministry of Health Fakes Casualty Numbers', *Tablet Magazine*, 7 March 2024, https://www.tabletmag.com/sections/news/articles/how-gaza-health-ministry-fakes-casualty-numbers; Andrew Fox, 'Questionable Counting: Analysing the Death Toll from the Hamas-Run Ministry of Health in Gaza', Henry Jackson Society, December 2024, https://www.henryjacksonsociety.org/wp-content/uploads/2024/12/HJS-Questionable-Counting-%E2%80%93-Hamas-Report-web.pdf.

[137] See Margarita Konaev, 'The Future of Urban Warfare in the Age of Megacities', Institut français des relations internationales (Ifri), March 2019, https://www.ifri.org/sites/default/files/migrated_files/documents/atoms/files/konaev_urban_warfare_megacities_2019.pdf.

[138] Michael N Schmitt, 'Human Shields in International Humanitarian Law' (2008) 38 *Israel Yearbook on Human Rights* 17.

[139] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (entered into force 7 December 1978) 1125 UNTS 3.

[140] Pnina Sharvit Baruch and Noam Neuman, 'Warning Civilians Prior to Attack under International Law: Theory and Practice' (2011) 41 *Israel Yearbook on Human Rights* 137.

[141] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461.

[142] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.

[143] *US Department of Defense Law of War Manual* (updated July 2023) s 5.19.1; ICRC Study (n 19) 188; Avraham Shalev, 'The Death of Siege? The Future of Siege Warfare in the Wake of Gaza' (2025) 26 *San Diego Journal of International Law* (forthcoming).

[144] HCJ 2280/24 *Gisha v Government of Israel*, Response of the Government of Israel, 2 April 2024, para 15 (in Hebrew).

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other urban conflicts, such as those of Fallujah (2004), Mosul (2016–17) and Marawi (2017), food insecurity is a significant feature of urban warfare.[145]

In its order of 26 January 2024, the ICJ relied on statistics from the United Nations and other international organisations detailing the large-scale destruction in Gaza to conclude that some of the rights violations claimed by South Africa were plausible.[146] However, the ICJ does not demonstrate that the destruction stems from intentional Israeli targeting, as opposed to valid (or even non-valid) collateral damage. According to long-standing military doctrine, battlefield decisions can be judged based only on the information available to the military commander at the time of the action.[147] Without examining the information available to the Israeli army commanders at the moment of every attack, the resulting damage is meaningless to an analysis of genocide. Indeed, military necessity would be a reasonable inference of intent.

South Africa presents martial statements by Israeli leaders as proof of genocidal intent. However, a careful analysis shows that these statements were not made by those who decide military policy, contradict actual Israeli conduct on the ground, or are ambiguous or taken out of context. South Africa relies on statements by Prime Minister Benjamin Netanyahu that Israel would 'operate forcefully everywhere', that Israel was 'striking [its] enemies with unprecedented might', and that Israel was ready to 'defeat the bloodthirsty monsters who have risen against [Israel] to destroy us'.[148] Nowhere in these statements does Netanyahu indicate that Israel will not conduct its campaign according to international humanitarian law. A reasonable inference from this statement would be Israel's resolve to combat Hamas.

Another intentionally truncated statement is that of President Herzog, who said: 'It's an entire nation out there that is responsible. It's not true this rhetoric about civilians not aware, not involved. It's absolutely not true'. The South African application cut off the next sentence in which he makes evident that there are Palestinians who oppose Hamas terror.[149] Herzog did not call for the targeting of Palestinian civilians but acknowledged the widespread popular support that Hamas enjoys among the Palestinian public. Herzog also reaffirmed that Israel conducts its operations according to international law.[150]

[145] Cedric Turlan and Kasra Mofarah, 'Military Action in an Urban Area: The Humanitarian Consequences of Operation Phantom Fury in Fallujah, Iraq', Humanitarian Practice Network, No 35, November 2006, 18, https://odihpn.org/wp-content/uploads/2006/11/humanitarianexchange035.pdf; 'Mosul Battle: Iraqi Forces Seize Key Bridge', *BBC News*, 27 February 2017, https://www.bbc.com/news/world-middle-east-39103701; Dennis Jay Santos, 'Starvation Threatens Hundreds Trapped by Fighting in Philippine City', *The New Humanitarian*, 19 June 2017, https://www.thenewhumanitarian.org/news/2017/06/19/starvation-threatens-hundreds-trapped-fighting-philippine-city.

[146] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Order: Request for the Indication of Provisional Measures, 26 January 2024, [46]–[49].

[147] United States Military Tribunal, Nuremberg, *The Hostages Trial: Trial of Wilhelm List and Others*, Case No 47, 1948, 68–69 (the 'Rendulic Rule').

[148] *South Africa v Israel*, Application (n 135) para 101.

[149] 'One-On-One with Israeli President Isaac Herzog; Israel Warns of "Next Stages" of the War; Israel Expected to Conduct "Significant Ground Operations" soon in Gaza', *CNN*, 15 October 2023, https://transcripts.cnn.com/show/cnr/date/2023-10-15/segment/01.

[150] Isaac Herzog, 'The Case against Israel Rests on Lies', *The Wall Street Journal*, 11 February 2024, https://www.wsj.com/articles/the-case-against-israel-rests-on-lies-the-hague-south-africa-genocide-gaza-bc7c264c.

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In its order of 26 January 2024, the ICJ relied on the above quote by President Herzog, as well as from Yoav Gallant (Israeli Minister of Defence) and Israel Katz (then Minister of Energy and Infrastructure) to indicate the plausibility of violation of Convention rights. Gallant's full statement reads as follows:[151]

> You saw what we are fighting against. We are fighting against human animals. This is the ISIS of Gaza. This is what we are fighting against. Gaza won't return to what it was before. We will eliminate everything. It doesn't take one day, it will take a week, it will take weeks, or even months, we will reach all places. There is no way that our brothers, our children, our parents will be killed and we won't react because we are a state. So we understand that Hamas wanted to change the situation. It'll change back 180 degrees and they'll regret this moment. They will regret it.

While this statement may be ambiguous as to whether it refers to Hamas or all Palestinians, the reference to 'the ISIS of Gaza' should be sufficient to clarify that it is aimed at Hamas. Once again, an inference of 'genocidal intent' would not be the only reasonable interpretation of this statement.

8.3. Genocide accusations as a rhetorical shield

Accusations of genocide by Israel serve as a rhetorical device to blunt recognition of the Hamas genocide against Israeli Jews. South Africa and the network of non-governmental organisations responsible for the charges against Israel have successfully linked Israel with genocide in the public sphere, making it more difficult to recognise claims of genocide by Hamas. As stated by Judge Bennouna in his Declaration in the Provisional Measures proceedings between Russia and Ukraine:[152]

> I am aware that this concept of genocide has been overused and indiscriminately employed by propagandists of all persuasions. This is neither in the interest of the human groups under serious threat of destruction, nor in the interest of the credibility and efficiency of the 1948 Convention, which has enjoyed massive support from States and their consent to the jurisdiction of the International Court of Justice for the settlement of disputes relating to the Convention.

Legal scholar Kenneth Marcus demonstrates that the reversal of genocide charges against the victim is a prevalent practice and was used by Nazi, Serbian and Hutu propagandists.[153] The Nazis, before and during their systematic murder of European Jewry, claimed that the Jews in fact planned to annihilate Germans. In *Mein Kampf*, Hitler wrote: '[I]f, with the help of his Marxist creed, the Jew is victorious over the other peoples of the world, his crown will be the funeral wreath of humanity and this

[151] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)*, Provisional Measures, Order of 26 January 2024 [2024] ICJ Rep 3, [52].

[152] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Provisional Measures, Order of 16 March 2022 [2022] ICJ Rep 211, Declaration of Judge Bennouna, [4].

[153] Kenneth L Marcus, 'Accusation in a Mirror' (2012) 43 *Loyola University Chicago Law Journal* 357.

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planet will, as it did millions of years ago, move through the ether devoid of men'.[154] Josef Goebbels, in a 1941 pamphlet, claimed that Germany was acting in self-defence: 'Who should die, the Germans or the Jews? … You know what your eternal enemy and opponent intends for you. There is only one instrument against his plans for annihilation'.[155]

Rwandan politician Leon Mugesera, who was charged in Canada with incitement to murder Tutsis, publicly told Hutus that Tutsis were conspiring to murder them: 'I am telling you, and I am not lying, … they only want to exterminate us. They only want to exterminate us: they have no other aim. We must tell them the truth'.[156] The ICTY observed that '[i]n articles, announcements, television programs and public proclamations, Serbs were told that they needed to protect themselves from a fundamentalist Muslim threat … that the Croats and Muslims were preparing a plan of genocide against them'.[157]

Furthermore, the charge of genocide against Israel has been a decades-long staple of contemporary antisemitism.[158] As researcher Izabella Tabarovsky determines, already in the 1950s and 1960s the Soviet Union promoted the canard of Israeli (Jewish) genocide against Palestinians.[159] Genocide accusations serve to appropriate terms and symbols associated with the genocide of Jews at the hands of the Germans and their collaborators and impose them on contemporary Jews. Turkey's President Tayyip Erdogan has said that 'Netanyahu has reached a level that would make Hitler jealous with his genocidal methods'.[160] Tunisian President Kais Saied rejected claims of antisemitism in Tunisia and accused Jews of repaying Tunisian help from the Nazis with genocide against Palestinians.[161] Brazilian President Luiz Inacio Lula da Silva said that 'what is happening in the Gaza Strip with the Palestinian people hasn't happened at any other moment in history' except one, '[w]hen Hitler decided to kill the Jews'.[162]

[154] Adolf Hitler, *Mein Kampf* (Ralph Manheim (tr), Houghton Mifflin 1971) 65.

[155] Susan Benesch, 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 *Virginia Journal of International Law* 485, 511.

[156] Supreme Court of Canada, *Mugesera v Canada (Minister of Citizenship and Immigration)*, Case No 30025, 28 June 2005, [2005] 2 SCR 100, Appendix III, para 18.

[157] *Tadić* (n 24) para 91.

[158] Lesley Klaff, 'Holocaust Inversion' (2019) 24(2) *Israel Studies* 73; Robert Solomon Wistrich, 'Antisemitism and Holocaust Inversion' in Jeffrey Herf and Anthony McElligott (eds), *Antisemitism Before and Since the Holocaust: Altered Contexts and Recent Perspectives* (Palgrave Macmillan Cham 2017) 37; Dovid Katz, 'Primary Holocaust Inversion and Eastern European Antisemitism' in Charles Asher Small (ed), *The ISGAP Papers: Antisemitism in Comparative Perspective* (CreateSpace Independent Publishing Platform 2018) 207.

[159] Izabella Tabarovsky, 'Demonization Blueprints: Soviet Conspiracist Antizionism in Contemporary Left-Wing Discourse' (2022) 5(1) *Journal of Contemporary Antisemitism* 1.

[160] 'Erdogan Says Netanyahu's "Genocidal Methods Would Make Hitler Jealous"', *The Times of Israel*, 12 May 2024, https://www.timesofisrael.com/erdogan-says-netanyahus-genocidal-methods-would-make-hitler-jealous.

[161] Gabe Friedman, 'Days after Synagogue Attack, Tunisian President Criticizes Israel and Says His Country Saved Jews in WWII', *Jewish Telegraphic Agency*, 16 May 2023, https://www.jta.org/2023/05/16/global/days-after-synagogue-attack-tunisian-president-criticizes-israel-and-says-his-country-saved-jews-in-wwii.

[162] Lazar Berman and TOI Staff, 'Israel Livid as Brazil's Lula Says Israel like "Hitler," Committing Genocide in Gaza', *The Times of Israel*, 18 February 2024, https://www.timesofisrael.com/israel-livid-as-brazils-lula-says-israel-like-hitler-committing-genocide-in-gaza.

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Finally, genocide charges appropriate symbols associated with Palestinian terror against Israelis and repackages them against Israel. For example, at the Oscars awards ceremony in March 2024, pro-Palestinian artists wore pins purportedly calling for a ceasefire in the form of red and bloody hands. While not necessarily intentional, for Israelis, raised and blood-soaked hands immediately recall the 2000 Ramallah lynching of Israeli reservists Vadim Norzhich and Yosef Avrahami. The two were detained by Palestinian police, beaten and then had their bodies mutilated by a Palestinian mob. One of the terrorists famously waved his bloody hands from the police station window, in what later became an iconic picture.[163]

Understanding this strategy of genocide inversion is crucial for two reasons: it helps to explain why Hamas' genocide has not been widely recognised as such, and it underscores the urgency of establishing clear legal accountability. These considerations directly inform our analysis of the international community's obligations under the Genocide Convention.

9. International legal obligations: Prevention, punishment and state responsibility

Because of its customary legal status, the Genocide Convention imposes several significant legal duties on state parties and, it can be argued, on all states.

The Genocide Convention, at its minimum, is a 'suppression convention', meaning that it obligates state parties to criminalise and prosecute cases of genocide.[164] Article V contains the basic suppression obligation, according to which:

> [t]he Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

As the state on the territory of which genocide was committed, the primary responsibility for prosecuting Hamas war criminals lies on Israel.[165] Since the beginning of Israel's defensive war against Hamas, it has arrested and detained thousands of Hamas militants, including those who actively participated in the October 7th killings. In 1950, Israel's parliament, the Knesset, passed the Law on the Prevention and Punishment of the Crime of Genocide (Genocide Law), which is modelled closely on the Genocide Convention. Therefore, Israel must prosecute Hamas war criminals according to the Genocide Law.

While the Genocide Convention does not require the prosecution of genocide under universal jurisdiction, nor does it bar it.[166] The trial of Hamas war criminals

[163] 'Red "Ceasefire" Pin at Oscars Reminiscent of Ramallah Lynching of Jews', *Jewish News Syndicate*, 13 March 2024, https://www.jns.org/oscars-attendees-wear-red-ceasefire-pin-linked-to-lynching-of-jews.

[164] Roger S Clark, 'State Obligations under the Genocide Convention in Light of the ICJ's Decision in the Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide' (2008) 61 *Rutgers Law Review* 75, 76–77.

[165] Genocide Convention (n 1) art VI.

[166] Amina Adanan, 'Reflecting on the Genocide Convention in Its Eighth Decade: How Universal Jurisdiction Developed over Genocide' (2021) 19 *Journal of International Criminal Justice* 1039.

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by states the nationals of which were murdered on October 7th or by states that host Hamas perpetrators would be a welcome development towards the advancement of universal justice and human rights.

Qatar, a non-state party to the Genocide Convention, hosts several top Hamas officials: Khalil al-Hayya, head of the Hamas communications department, and Khaled Mashal, former politburo head and chief of the Hamas diaspora office.[167] On 20 May 2024, the Prosecutor of the International Criminal Court applied for an arrest warrant against Ismail Haniyeh;[168] Israel has since killed Haniyeh and the ICC has not issued an arrest warrant against him.[169]

Iran, also a non-state party to the Convention, is another major patron of Hamas. Reports in *The Wall Street Journal* indicate that in the weeks before the October 7th attacks, close to 500 Hamas and Palestinian Islamic Jihad militants underwent specialised combat training in Iran. These sessions were led by the Quds Force, a division of the Islamic Revolutionary Guard Corps (IRGC) responsible for training paramilitary groups. They included senior Palestinian officials and Brigadier General Esmail Qaani, head of the Quds Force. The tactics and technology used by Hamas, such as aerial drones and motorcycle attacks, show clear Iranian influence.[170] Another report reveals that the attack was carefully coordinated over months by the IRGC, Hamas and Hezbollah, with Iranian officials giving the final approval during a meeting in Beirut on the Monday before the attack.[171]

Given the status of the Genocide Convention as customary law, it can be argued that Qatar and Iran are required to prosecute Hamas leaders or to extradite them to states that are willing to prosecute them.[172] In the *Bosnian Genocide Case*, the ICJ found Serbia responsible for failing its international obligations by failing to bring perpetrators to its domestic courts and to cooperate with the ICTY.[173] Additionally, Qatar and Iran must refrain from providing safe haven for Hamas leaders, or from funding and training Hamas fighters.

The ICJ, most notably in *Gambia v Myanmar*, has held that all states have a compelling interest in preventing genocide. In *Nicaragua v Germany*, Nicaragua demanded that the Court order Germany to suspend its military aid to Israel and renew funding

[167] Foundation for Defense of Democracies, '10 Things to Know about Hamas and Qatar', 19 December 2023, https://www.fdd.org/analysis/2023/12/19/10-things-to-know-about-hamas-and-qatar.

[168] Karim AA Khan, 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for Arrest Warrants in the Situation in the State of Palestine', International Criminal Court, 20 May 2024, https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.

[169] Ronen Bergman and others, 'Bomb Smuggled into Tehran Guesthouse Months Ago Killed Hamas Leader', *The New York Times*, 1 August 2024, https://www.nytimes.com/2024/08/01/world/middleeast/how-hamas-leader-haniyeh-killed-iran-bomb.html.

[170] Center for Strategic and International Studies, 'Hamas' October 7 Attack: The Tactics, Targets, and Strategy of Terrorists', 7 November 2023, https://www.csis.org/analysis/hamas-october-7-attack-tactics-targets-and-strategy-terrorists.

[171] Summer Said, Benoit Faucon and Stephen Kalin, 'Iran Helped Plot Attack on Israel over Several Weeks, *The Wall Street Journal*, 8 October 2023, https://www.wsj.com/world/middle-east/iran-israel-hamas-strike-planning-bbe07b25.

[172] Patricia M Wald, 'Genocide and Crimes Against Humanity' (2007) 6 *Washington University Global Studies Law Review* 621.

[173] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment [2007] ICJ Rep 47, [438]–[450], [471].

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to UNRWA in the light of Israel's supposed violation of the Genocide Convention.[174] While the Court did not order any provisional measures, it ruled that it had jurisdiction over Nicaragua's request. Accordingly, every state party may seize the Court over a state party's failure of secondary obligations under the Convention. As such, states that provide safe haven for Hamas officials, and allow fundraising or recruiting, fail to criminalise Hamas, or fail to prosecute Hamas criminals may be seized for failure to fulfil their Convention duties. This applies also to states that conduct diplomatic relations with Qatar and Iran without ensuring that they fulfil their duties to prevent genocide.

States that have not recognised Hamas as a terrorist organisation must do so immediately and act to prevent Hamas from recruiting, operating, mobilising or fundraising on their territory. The Hamas network of terror incitement can be found on social media, television and radio, in its education system, mosques and public rallies. This means seizing and closing channels or platforms that allow incitement, and prosecuting those responsible for incitement to genocide. While some of these obligations stem from the various terrorism-related conventions, the Hamas genocide provides a new legal impetus to act.[175]

10. Conclusion

The evidence examined in this article demonstrates that the attack on October 7th by Hamas constitutes genocide under international law. This conclusion rests on three interconnected pillars. First, the physical acts committed – the systematic killing of over 1,200 Israelis, accompanied by torture, sexual violence and mutilation – satisfy the *actus reus* requirement of the Genocide Convention. Second, Hamas' specific intent to destroy Israeli Jews as a group is evidenced through multiple channels: its foundational ideology of eliminationist antisemitism, its decades-long systematic policy of incitement, its detailed operational planning for mass killing, and explicit statements by its leadership before and during the attack.

What distinguishes this case, however, is the third element: the immediate deployment of reverse genocide accusations against the victims. This strategy of genocide inversion, exemplified by South Africa's application to the ICJ, represents a sophisticated evolution in how perpetrators shield themselves from accountability. By appropriating and weaponising genocide accusations, Hamas and its allies have created a rhetorical shield that both deflects attention from its own genocidal actions and exploits Jewish historical trauma – a pattern observed in previous genocides but never executed with such rapid precision.

These findings have significant implications for international law and policy. States that provide safe haven for Hamas leaders or fail to prevent Hamas operations

[174] ICJ, *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v Germany)*, Application Instituting Proceedings and Request for the Indication of Provisional Measures, 1 March 2024, [101].

[175] See Andrea Gioia, 'The UN Conventions on the Prevention and Suppression of International Terrorism' in Giuseppe Nesi (ed), *International Cooperation in Counter-Terrorism* (Ashgate 2006) 3; Ilias Bantekas, 'The International Law on Terrorist Financing' in Ben Saul (ed), *Research Handbook on International Law and Terrorism* (Edward Elgar 2020) 97; Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933.

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on their territory may violate their obligations under the Genocide Convention. The international community must act to close the accountability gap for non-state actors who commit genocide, particularly when they control territory and civilian populations. Most urgently, the recognition of Hamas' actions as genocide creates immediate legal obligations for all state parties to prevent and punish these acts.

Beyond the immediate legal consequences, this analysis reveals the urgent need to protect the integrity of genocide as a legal concept. The weaponisation of genocide accusations threatens to undermine the Convention's effectiveness as a tool for preventing and punishing the 'crime of crimes'. As this article demonstrates, only by maintaining rigorous legal standards for proving genocide – while remaining alert to how these standards can be manipulated – can international law effectively address mass atrocities in an era of hybrid warfare and sophisticated information operations.

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